IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,* v. Staff Sergeant (E-5) **JOHN ANDRE N. MABIDA,** United States Air Force *Appellant.*	))))))))))	**NOTICE OF DIRECT APPEAL PURSUANT TO ARTICLE 66(b)(1)(A), UCMJ** No. ACM _____ 27 June 2024

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

At Keesler Air Force Base, Mississippi, officer and enlisted members convened at a general court-martial convicted Appellant, Staff Sergeant (SSgt) John Andre N. Mabida, contrary to his pleas, of violating one charge and specification of Article 128b, Uniform Code of Military Justice (UCMJ), domestic violence. Entry of Judgment, 15 November 2023.[1]

On 15 September 2023, the military judge sentenced SSgt Mabida to four months' confinement, reduction in pay grade to E-2, forfeiture of $500.00 pay per month for four months, and a reprimand. Statement of Trial Results, 16 September 2023.

SSgt Mabida has not submitted any materials to The Judge Advocate General in accordance with Article 69, UCMJ. On 16 April 2024, the Government mailed SSgt Mabida notice of his right to appeal.

[1] Two specifications of domestic violence were withdrawn and dismissed without prejudice as a result of a mistrial. *Id*. Consistent with SSgt Mabida's pleas, the members found him not guilty of one charge and specification of sexual assault, one charge and specification of larceny, and five specifications of domestic violence, in alleged violation of Articles 120, 121, and 128b. *Id*.

Pursuant to Article 66(b)(1)(A), UCMJ, SSgt Mabida respectfully files his notice of direct appeal.

Respectfully submitted,

[redacted]

SAMANTHA P. GOLSETH, Maj, USAF
Appellate Defense Counsel

[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Appellate Government Division on 27 June 2024.

Respectfully submitted,

[redacted]

SAMANTHA P. GOLSETH, Maj, USAF
Appellate Defense Counsel

[redacted]

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM _____**
Appellee	)	
	)	
v.	)	
	)	**NOTICE OF**
John Andre N. MABIDA	)	**DOCKETING**
Staff Sergeant (E-5)	)	
U.S. Air Force	)	
Appellant	)	

On 27 June 2024, this court received a notice of direct appeal from Appellant in the above-styled case, pursuant to Article 66(b)(1)(A), Uniform Code of Military Justice, 10 U.S.C. § 866(b)(1)(A).

As of the date of this notice, the court has not yet received a record of trial in Appellant's case.

Accordingly, it is by the court on this 27th day of June, 2024,

ORDERED:

The case in the above-styled matter is referred to Panel 1.

It is further ordered:

The Government will forward a copy of the record of trial to the court forthwith.

FOR THE COURT

[redacted]

TANICA S. BAGMON
Appellate Court Paralegal

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40682**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
John Andre N. MABIDA	)	
Staff Sergeant (E-5)	)	
U.S. Air Force	)	
Appellant	)	**Panel 1**

On 7 November 2024, counsel for Appellant submitted a Motion for Enlargement of Time (First) requesting an additional 60 days to submit Appellant's assignments of error. The Government opposed the motion.

The court has considered Appellant's motion, the Government's opposition, case law, and this court's Rules of Practice and Procedure.

Accordingly, it is by the court on this 13th day of November, 2024,

ORDERED:

Appellant's Motion for Enlargement of Time (First) is **GRANTED**. Appellant shall file any assignments of error not later than **18 January 2025**.

Each request for an enlargement of time will be considered on its merits. Appellant's counsel is advised that any subsequent motions for enlargement of time shall include, in addition to matters required under this court's Rules of Practice and Procedure, statements as to: (1) whether Appellant was advised of Appellant's right to a timely appeal, (2) whether Appellant was provided an update of the status of counsel's progress on Appellant's case, (3) whether Appellant was advised of the request for an enlargement of time, and (4) whether Appellant agrees with the request for an enlargement of time.

FOR THE COURT

[redacted]

CAROL K. JOYCE
Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	**APPELLANT'S MOTION FOR**
Appellee,	)	**ENLARGEMENT OF TIME**
	)	**(FIRST)**
v.	)	
	)	Before Panel No. 1
Staff Sergeant (E-5)	)	
JOHN ANDRE N. MABIDA,	)	No. ACM 40682
United States Air Force,	)	
Appellant.	)	7 November 2024

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Staff Sergeant (SSgt) John Andre N. Mabida moves for an enlargement of time to file his assignments of error. A.F. CT. CRIM. APP. R. 23.3(m)(2) and 23.3(m)(6). SSgt Mabida requests an enlargement for a period of 60 days, which will end on **18 January 2025**. SSgt Mabida's case was docketed with this Court on 27 June 2024, but this Court had not yet received the record of trial in his case. Notice of Docketing. On 20 September 2024, this Court received SSgt Mabida's record of trial, beginning the time-period for SSgt Mabida to file his assignments of error. From the date of docketing to the present date, 133 days have elapsed. On the date requested, 205 days will have elapsed.

SSgt Mabida was convicted by officer and enlisted members convened at a general court-martial, contrary to his pleas, of violating one charge and specification of Article 128b, Uniform Code of Military Justice (UCMJ), domestic violence. Entry of Judgment, 15 November 2023.[1] The military judge sentenced SSgt Mabida to four months' confinement, reduction in pay grade to E-2, forfeiture of $500.00 pay per month for four months, and a reprimand. Statement of Trial

[1] Two specifications of domestic violence were withdrawn and dismissed without prejudice as a result of a mistrial. *Id*. Consistent with SSgt Mabida's pleas, the members found him not guilty of one charge and specification of sexual assault, one charge and specification of larceny, and five specifications of domestic violence, in alleged violation of Articles 120, 121, and 128b. *Id*.

Results, 16 September 2023. The convening authority took no action on the findings or sentence. Convening Authority Decision on Action, 17 October 2023. The record of trial includes 9 prosecution exhibits, 20 defense exhibits, 44 appellate exhibits, 1 court exhibit, and 997 pages of transcript. SSgt Mabida is not confined. Through no fault of SSgt Mabida, undersigned counsel has been working on other assigned matters and has yet to complete her review of his case. This enlargement of time is necessary to allow undersigned counsel to fully review his case and advise him regarding potential errors.

Undersigned counsel also provides the following information: undersigned counsel currently represents 26 clients and is presently assigned 13 cases pending initial brief before this Court. Twelve cases currently have priority over the present case:

1. *United States v. Casillas*, No. ACM 40551 – The record of trial includes 19 prosecution exhibits, 4 defense exhibits, 65 appellate exhibits, and 1,627 transcript pages. The appellant is confined, and his case was docketed on 14 December 2023. Undersigned counsel is reviewing and identifying potential issues. *United States v. George*, *Jr.*, discussed below, will interrupt undersigned counsel's completion of the appellant's assignments of error from 14 November 2024-10 December 2024.
2. *United States v. George*, *Jr.*, USCA Dkt. No. 24-0206/AF, No. ACM 40397 – The Government's answer brief is due on 14 November 2024 (extended from 7 November 2024 due to a request by the Government). Once filed, undersigned counsel must prioritize the appellant's reply brief which is expected to be due on 24 November 2024. Following the submission of appellant's reply brief, undersigned counsel will need to prepare for oral argument which is scheduled at the U.S. Court of Appeals for the Armed Forces (CAAF) on 10 December 2024.

3. *United States v. Dawson*, No. ACM 24041 – The record of trial includes 13 prosecution exhibits, 9 defense exhibits, 1 court exhibit, 41 appellate exhibits, and 761 transcript pages. The appellant is not confined. Undersigned counsel has prioritized this case above others because it was docketed on 4 October 2023. This Court and undersigned counsel received the verbatim transcript on 9 August 2024.
4. *United States v. Hagen*, No. ACM 40561 – The record of trial includes 8 prosecution exhibits, 8 defense exhibits, 48 appellate exhibits, and 817 transcript pages. In total, the electronic record of trial is 1,786 pages and contains multiple media files. The appellant is not confined, and his case was docketed on 26 January 2024.
5. *United States v. Valadez*, No. ACM 40553 – The 4-volume record of trial includes 6 appellate exhibits, 2 prosecution exhibits, 5 defense exhibits, 2 court exhibits, and 151 transcript pages. The appellant is confined, and his case was docketed on 6 February 2024. Undersigned counsel has filed a motion for withdrawal as appellate defense counsel because substitute appellate defense counsel has made an appearance. The motion to withdraw is pending before this Court.
6. *United States v. Blair*, No. ACM S32778 – The record of trial includes 7 prosecution exhibits, 22 defense exhibits, 6 appellate exhibits, and 187 transcript pages. The appellant is not confined, and his case was docketed on 22 April 2024.
7. *United States v. Roberts*, No. ACM 40608 – The 11-volume record of trial includes 30 prosecution exhibits, 3 defense exhibits, 1 court exhibit, 102 appellate exhibits, and 1,627 transcript pages. The appellant is confined, and his case was docketed on 7 May 2024.

8. *United States v. Robinson*, No. ACM 24044 – The 10-volume record of trial includes 23 prosecution exhibits, 8 defense exhibits, 58 appellate exhibits, and 1,112 transcript pages. The appellant is not confined, and his case was docketed on 30 May 2024.
9. *United States v. Lovell*, No. ACM 40614 – The record of trial includes 4 prosecution exhibits, 5 appellate exhibits, and 85 pages of transcript. The appellant is confined, and his case was docketed on 31 May 2024.
10. *United States v. Shirley*, No. ACM 40618 – The record of trial includes 3 prosecution exhibits, 2 defense exhibits, 8 appellate exhibits, and 153 transcript pages. The appellant is confined, and his case was docketed on 5 June 2024.
11. *United States v. Tompkins*, No. ACM 40619 – The record of trial is 849 pages in total and includes 3 prosecution exhibits, 12 defense exhibits, 5 appellate exhibits, 1 court exhibit, and 160 transcript pages. The appellant is confined, and his case was docketed 11 June 2024.
12. *United States v. Bays*, No. ACM 24043 – The record of trial includes 3 prosecution exhibits, 4 defense exhibits, 4 appellate exhibits, and 154 transcript pages. The appellant is not confined, and his case was docketed 8 July 2024. Due to the brevity of this record, it has been prioritized over SSgt Mabida's record, which was filed 11 days earlier on 27 June 2024.

In addition to the above-listed priorities, undersigned counsel anticipates filing CAAF petitions and supplements in three cases: *United States v. Manzano-Tarin*, No. ACM S32734 (f rev); *United States v. Johnson*, No. ACM 40291 (f rev); and *United States v. Matthew*, No. ACM 39796 (reh).

WHEREFORE, SSgt Mabida respectfully requests this Honorable Court grant the requested enlargement of time.

Respectfully submitted,

[redacted]

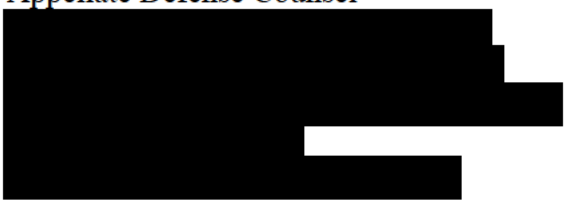
SAMANTHA P. GOLSETH, Maj, USAF
Appellate Defense Counsel
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 7 November 2024.

Respectfully submitted,

SAMANTHA P. GOLSETH, Maj, USAF
Appellate Defense Counsel



13 November 2024

1IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) JOHN ANDRE N. MABIDA, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40682 Panel No. 1

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States hereby enters its general opposition to Appellant's Motion for Enlargement of Time to file an Assignment of Error in this case.

WHEREFORE, the United States respectfully requests that this Court deny Appellant's enlargement motion.

[redacted]
MARY ELLEN PAYNE
Associate Chief, Government Trial and
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 13 November 2024.

[redacted]
MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
[redacted]

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (SECOND)**
v.	)	
	)	Before Panel No. 1
Staff Sergeant (E-5) **JOHN ANDRE N. MABIDA,** United States Air Force, *Appellant.*	)	No. ACM 40682
	)	10 January 2025

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Staff Sergeant (SSgt) John Andre N. Mabida moves for an enlargement of time to file his assignments of error.[1] A.F. CT. CRIM. APP. R. 23.3(m)(3) and 23.3(m)(6). SSgt Mabida requests an enlargement for a period of 30 days, which will end on **17 February 2025**. SSgt Mabida's case was docketed with this Court on 27 June 2024, but this Court had not yet received the record of trial in his case. Notice of Docketing. From the date of docketing to the present date, 197 days have elapsed. From the date of docketing to the date requested, 235 days will have elapsed. On 20 September 2024, this Court received SSgt Mabida's record of trial, beginning the time-period for SSgt Mabida to file his assignments of error. JT. CT. CRIM. APP. R. 18(d)(2). From the date this Court received the record to the present date, 112 days have elapsed. From the date this Court received the record to the date requested, 150 days will have elapsed.

SSgt Mabida was convicted by officer and enlisted members convened at a general court-martial, contrary to his pleas, of violating one charge and specification of Article 128b, Uniform

[1] SSgt Mabida withdraws his previously filed Motion for Enlargement of Time (Second), filed on 8 January 2025. SSgt Mabida withdraws that filing and submits this motion, which adds the number of days since this Court received the record to present date, and to the date requested.

Code of Military Justice (UCMJ), domestic violence. Entry of Judgment, 15 November 2023.[2] The military judge sentenced SSgt Mabida to four months' confinement, reduction in pay grade to E-2, forfeiture of $500.00 pay per month for four months, and a reprimand. Statement of Trial Results, 16 September 2023. The convening authority took no action on the findings or sentence. Convening Authority Decision on Action, 17 October 2023. The record of trial includes 9 prosecution exhibits, 20 defense exhibits, 44 appellate exhibits, 1 court exhibit, and 997 pages of transcript. SSgt Mabida is not confined. Through no fault of SSgt Mabida, undersigned counsel has been working on other assigned matters and has yet to complete her review of his case. This enlargement of time is necessary to allow undersigned counsel to fully review his case and advise him regarding potential errors. SSgt Mabida was advised of his right to a timely appeal. He was provided an update of the status of undersigned counsel's progress on his case. He was advised of this request for an enlargement of time, and he agrees with this request for an enlargement of time.

Undersigned counsel currently represents 20 clients and is presently assigned 8 cases pending initial brief before this Court. Seven cases currently have priority over the present case:

1. *United States v. Casillas*, No. ACM 40551 – The record of trial includes 19 prosecution exhibits, 4 defense exhibits, 65 appellate exhibits, and 1,627 transcript pages. The appellant is confined, and his case was docketed on 14 December 2023. Undersigned counsel is drafting the appellant's assignments of error that will be filed by or before 17 January 2025.

[2] Two specifications of domestic violence were withdrawn and dismissed without prejudice as a result of a mistrial. *Id*. Consistent with SSgt Mabida's pleas, the members found him not guilty of one charge and specification of sexual assault, one charge and specification of larceny, and five specifications of domestic violence, in alleged violation of Articles 120, 121, and 128b. *Id*.

2. *United States v. Hagen*, No. ACM 40561 – The record of trial includes 8 prosecution exhibits, 8 defense exhibits, 48 appellate exhibits, and 817 transcript pages. In total, the electronic record of trial is 1,786 pages and contains multiple media files. The appellant is not confined, and his case was docketed on 26 January 2024.
3. *United States v. Roberts*, No. ACM 40608 – The 11-volume record of trial includes 30 prosecution exhibits, 3 defense exhibits, 1 court exhibit, 102 appellate exhibits, and 1,627 transcript pages. The appellant is confined, and his case was docketed on 7 May 2024.
4. *United States v. Robinson*, No. ACM 24044 – The 10-volume record of trial includes 23 prosecution exhibits, 8 defense exhibits, 58 appellate exhibits, and 1,112 transcript pages. The appellant is not confined, and his case was docketed on 30 May 2024.
5. *United States v. Lovell*, No. ACM 40614 – The record of trial includes 4 prosecution exhibits, 5 appellate exhibits, and 85 pages of transcript. The appellant is confined, and his case was docketed on 31 May 2024.
6. *United States v. Tompkins*, No. ACM 40619 – The record of trial is 849 pages in total and includes 3 prosecution exhibits, 12 defense exhibits, 5 appellate exhibits, 1 court exhibit, and 160 transcript pages. The appellant is confined, and his case was docketed 11 June 2024.
7. *United States v. Bays*, No. ACM 24043 – The record of trial includes 3 prosecution exhibits, 4 defense exhibits, 4 appellate exhibits, and 154 transcript pages. The appellant is not confined, and his case was docketed 8 July 2024. Due to the brevity of this record, it has been prioritized over SSgt Mabida's record, which was filed 11 days earlier on 27 June 2024.

In addition to the above-listed priorities, undersigned counsel anticipates filing CAAF petitions and supplements in two cases: *United States v. Benoit*, No. ACM 40508, and *United States v. Matthew*, No. ACM 39796 (reh).

WHEREFORE, SSgt Mabida respectfully requests this Honorable Court grant the requested enlargement of time.

Respectfully submitted,

[redacted]

SAMANTHA P. GOLSETH, Maj, USAF
Appellate Defense Counsel
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 10 January 2025.

Respectfully submitted,

[redacted]
SAMANTHA P. GOLSETH, Maj, USAF
Appellate Defense Counsel
[redacted]

13 January 2025

1IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) JOHN ANDRE N. MABIDA, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40682 Panel No. 1

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States hereby enters its general opposition to Appellant's Motion for Enlargement of Time to file an Assignment of Error in this case.

WHEREFORE, the United States respectfully requests that this Court deny Appellant's enlargement motion.

[redacted]
MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 13 January 2025.

[redacted]
MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
[redacted]

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (THIRD)**
v.	)	
	)	Before Panel No. 1
Staff Sergeant (E-5) **JOHN ANDRE N. MABIDA,** United States Air Force, *Appellant.*	)	No. ACM 40682
	)	7 February 2025

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Staff Sergeant (SSgt) John Andre N. Mabida moves for an enlargement of time to file his assignments of error. A.F. CT. CRIM. APP. R. 23.3(m)(3) and 23.3(m)(6). SSgt Mabida requests an enlargement for a period of 30 days, which will end on **19 March 2025**. SSgt Mabida's case was docketed with this Court on 27 June 2024. From the date of docketing to the present date, 225 days have elapsed. From the date of docketing to the date requested, 265 days will have elapsed. On 20 September 2024, this Court received SSgt Mabida's record of trial, beginning the time-period for SSgt Mabida to file his assignments of error. JT. CT. CRIM. APP. R. 18(d)(2). From the date this Court received the record to the present date, 140 days have elapsed. From the date this Court received the record to the date requested, 180 days will have elapsed.

SSgt Mabida was convicted by officer and enlisted members convened at a general court-martial, contrary to his pleas, of violating one charge and specification of Article 128b, Uniform Code of Military Justice (UCMJ), domestic violence. Entry of Judgment, 15 November 2023.[1] The military judge sentenced SSgt Mabida to four months' confinement, reduction in pay grade to

[1] Two specifications of domestic violence were withdrawn and dismissed without prejudice as a result of a mistrial. *Id*. Consistent with SSgt Mabida's pleas, the members found him not guilty of one charge and specification of sexual assault, one charge and specification of larceny, and five specifications of domestic violence, in alleged violation of Articles 120, 121, and 128b. *Id*.

E-2, forfeiture of $500.00 pay per month for four months, and a reprimand. Statement of Trial Results, 16 September 2023. The convening authority took no action on the findings or sentence. Convening Authority Decision on Action, 17 October 2023. The record of trial includes 9 prosecution exhibits, 20 defense exhibits, 44 appellate exhibits, 1 court exhibit, and 997 pages of transcript. SSgt Mabida is not confined. Through no fault of SSgt Mabida, undersigned counsel has been working on other assigned matters and has yet to complete her review of his case. This enlargement of time is necessary to allow undersigned counsel to fully review his case and advise him regarding potential errors. SSgt Mabida was advised of his right to a timely appeal. He was provided an update of the status of undersigned counsel's progress on his case. He was advised of this request for an enlargement of time, and he agrees with this request for an enlargement of time.

Undersigned counsel currently represents 6 clients and is presently assigned 6 cases pending initial brief before this Court. Five cases currently have priority over the present case:

1. *Lovell*, No. ACM 40614 – 85 pages – presently on EOT 6
2. *Hymel*, No. ACM 40627 – 634 pages – presently on EOT 6
3. *Nelson*, No. ACM 24042 – 336 pages – presently on EOT 4
4. *Hahn*, No. ACM 40657 – 81 pages – presently on EOT 3
5. *Corliss*, No. ACM 40656 – 402 pages – presently on EOT 3

Major Golseth currently represents 20 clients and is presently assigned 8 cases pending initial brief before this Court. Seven cases currently have priority over the present case:

1. *United States v. Casillas*, No. ACM 40551 – The record of trial includes 19 prosecution exhibits, 4 defense exhibits, 65 appellate exhibits, and 1,627 transcript pages. The appellant is confined, and his case was docketed on 14 December 2023. Undersigned

counsel is drafting the appellant's assignments of error that will be filed by or before 17 January 2025.

2. *United States v. Hagen*, No. ACM 40561 – The record of trial includes 8 prosecution exhibits, 8 defense exhibits, 48 appellate exhibits, and 817 transcript pages. In total, the electronic record of trial is 1,786 pages and contains multiple media files. The appellant is not confined, and his case was docketed on 26 January 2024.
3. *United States v. Roberts*, No. ACM 40608 – The 11-volume record of trial includes 30 prosecution exhibits, 3 defense exhibits, 1 court exhibit, 102 appellate exhibits, and 1,627 transcript pages. The appellant is confined, and his case was docketed on 7 May 2024.
4. *United States v. Robinson*, No. ACM 24044 – The 10-volume record of trial includes 23 prosecution exhibits, 8 defense exhibits, 58 appellate exhibits, and 1,112 transcript pages. The appellant is not confined, and his case was docketed on 30 May 2024.
5. *United States v. Lovell*, No. ACM 40614 – The record of trial includes 4 prosecution exhibits, 5 appellate exhibits, and 85 pages of transcript. The appellant is confined, and his case was docketed on 31 May 2024.
6. *United States v. Tompkins*, No. ACM 40619 – The record of trial is 849 pages in total and includes 3 prosecution exhibits, 12 defense exhibits, 5 appellate exhibits, 1 court exhibit, and 160 transcript pages. The appellant is confined, and his case was docketed 11 June 2024.
7. *United States v. Bays*, No. ACM 24043 – The record of trial includes 3 prosecution exhibits, 4 defense exhibits, 4 appellate exhibits, and 154 transcript pages. The appellant is not confined, and his case was docketed 8 July 2024. Due to the brevity of

this record, it has been prioritized over SSgt Mabida's record, which was filed 11 days earlier on 27 June 2024.

In addition to the above-listed priorities, Major Golseth anticipates filing CAAF petitions and supplements in two cases: *United States v. Benoit*, No. ACM 40508, and *United States v. Matthew*, No. ACM 39796 (reh).

WHEREFORE, SSgt Mabida respectfully requests this Honorable Court grant the requested enlargement of time.

Respectfully submitted,

[redacted]

LUKE D. WILSON, Lt Col, USAF
Appellate Defense Counsel
[redacted]

[redacted]

SAMANTHA P. GOLSETH, Maj, USAF
Appellate Defense Counsel
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 7 February 2025.

Respectfully submitted,

LUKE D. WILSON, Lt Col, USAF
Appellate Defense Counsel
[redacted]

11 February 2025

1IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) JOHN ANDRE N. MABIDA, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40682 Panel No. 1

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States hereby enters its general opposition to Appellant's Motion for Enlargement of Time to file an Assignment of Error in this case.

WHEREFORE, the United States respectfully requests that this Court deny Appellant's enlargement motion.

[redacted]
JENNY A. LIABENOW, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 11 February 2025.

[redacted]
JENNY A. LIABENOW, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
[redacted]

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	**APPELLANT'S MOTION FOR**
Appellee,	)	**ENLARGEMENT OF TIME**
	)	**(FOURTH)**
v.	)	
	)	Before Panel No. 1
Staff Sergeant (E-5)	)	
JOHN ANDRE N. MABIDA,	)	No. ACM 40682
United States Air Force,	)	
Appellant.	)	10 March 2025

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Staff Sergeant (SSgt) John Andre N. Mabida moves for an enlargement of time to file his assignments of error. A.F. CT. CRIM. APP. R. 23.3(m)(3) and 23.3(m)(6). SSgt Mabida requests an enlargement for a period of 30 days, which will end on **18 April 2025**. SSgt Mabida's case was docketed with this Court on 27 June 2024. From the date of docketing to the present date, 256 days have elapsed. From the date of docketing to the date requested, 295 days will have elapsed. On 20 September 2024, this Court received SSgt Mabida's record of trial, beginning the time-period for SSgt Mabida to file his assignments of error. JT. CT. CRIM. APP. R. 18(d)(2). From the date this Court received the record to the present date, 171 days have elapsed. From the date this Court received the record to the date requested, 210 days will have elapsed.

SSgt Mabida was convicted by officer and enlisted members convened at a general court-martial, contrary to his pleas, of violating one charge and specification of Article 128b, Uniform Code of Military Justice (UCMJ), domestic violence. Entry of Judgment, 15 November 2023.[1] The military judge sentenced SSgt Mabida to four months' confinement, reduction in pay grade to

[1] Two specifications of domestic violence were withdrawn and dismissed without prejudice as a result of a mistrial. *Id*. Consistent with SSgt Mabida's pleas, the members found him not guilty of one charge and specification of sexual assault, one charge and specification of larceny, and five specifications of domestic violence, in alleged violation of Articles 120, 121, and 128b. *Id*.

E-2, forfeiture of $500.00 pay per month for four months, and a reprimand. Statement of Trial Results, 16 September 2023. The convening authority took no action on the findings or sentence. Convening Authority Decision on Action, 17 October 2023. The record of trial includes 9 prosecution exhibits, 20 defense exhibits, 44 appellate exhibits, 1 court exhibit, and 997 pages of transcript. SSgt Mabida is not confined. Through no fault of SSgt Mabida, undersigned counsel has been working on other assigned matters and has yet to complete her review of his case. This enlargement of time is necessary to allow undersigned counsel to fully review his case and advise him regarding potential errors. SSgt Mabida was advised of his right to a timely appeal. He was provided an update of the status of undersigned counsel's progress on his case. He was advised of this request for an enlargement of time, and he agrees with this request for an enlargement of time.

Undersigned counsel currently represents 6 clients and is presently assigned 6 cases pending initial brief before this Court. Five cases currently have priority over the present case:

1. *Lovell*, No. ACM 40614 – 85 pages – presently on EOT 7. The record has been reviewed and is in the process of being briefed. The record is two volumes, includes 4 prosecution exhibits, and 5 appellate exhibits. SrA Lovell is confined

2. *Hymel*, No. ACM 40627 – 634 pages – presently on EOT 7. Counsel is in the process of reviewing the record. The record of trial consists of five volumes. There are five prosecution exhibits, eight defense exhibits, and 18 appellate exhibits. Capt Hymel is not currently confined.

3. *Nelson*, No. ACM 24042 – 336 pages – presently on EOT 4 – The record of trial is three volumes consisting of 15 prosecution exhibits, one defense exhibit, and 17 appellate

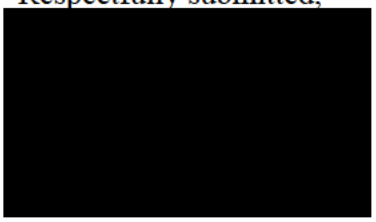
exhibits; the transcript is 336 pages. Appellant is not currently confined. Undersigned counsel has not yet begun reviewing the record of trial in this case.

4. *Hahn*, No. ACM 40657 – 81 pages – presently on EOT 4 - The record of trial consists of three volumes with four prosecution exhibits, one court exhibit, seven defense exhibits, and five appellate exhibits; the transcript is 81 pages. Appellant is currently confined.

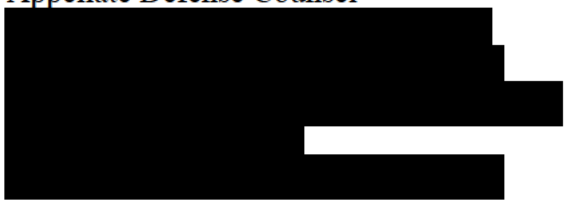
5. *Corliss*, No. ACM 40656 – 402 pages – presently on EOT 3 - The trial transcript is 88 pages long and the record of trial (ROT) is an electronic ROT, which is one volume of 402 pages. There are five admitted Prosecution Exhibits, six Defense Exhibits, and one Appellate Exhibit. Appellant is not currently confined.

WHEREFORE, SSgt Mabida respectfully requests this Honorable Court grant the requested enlargement of time.

Respectfully submitted,



LUKE D. WILSON, Lt Col, USAF
Appellate Defense Counsel



CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 10 March 2025.

Respectfully submitted,

LUKE D. WILSON, Lt Col, USAF
Appellate Defense Counsel
[redacted]

11 March 2025

1IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) JOHN ANDRE N. MABIDA, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME Before Panel No. 1 No. ACM 40682 11 March 2025

TO THE HONORABLE, THE JUDGES OF
THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States hereby enters its general opposition to Appellant's Motion for Enlargement of Time to file an Assignment of Error in this case.

WHEREFORE, the United States respectfully requests that this Court deny Appellant's enlargement motion.

[redacted]
JOCELYN Q. WRIGHT, Maj, USAF
Appellate Government Counsel
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 11 March 2025.

[redacted]

JOCELYN Q. WRIGHT, Maj, USAF
Appellate Government Counsel
[redacted]

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**MOTION FOR WITHDRAWAL OF APPELLATE DEFENSE COUNSEL**
v.	)	Before Panel No. 1
Staff Sergeant (E-5) **JOHN ANDRE N. MABIDA,** United States Air Force, *Appellant.*	)	No. ACM 40682 27 February 2025

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Undersigned counsel, Major (Maj) Samantha Golseth, moves to withdraw her appearance as appellate defense counsel in the above-captioned case. JT. CT. CRIM. APP. R. 12(b), 23; A.F. CT. CRIM. APP. R. 12.4, 23.3(h). Staff Sergeant (SSgt) John Andre D. Mabida, Appellant, consents to Maj Golseth's withdrawal as appellate defense counsel. Lieutenant Colonel (Lt Col) Luke Wilson, has been detailed to represent SSgt Mabida and provided notice of his appearance in Appellant's Motion for Enlargement of Time (Third), filed on 7 February 2025. A thorough turnover of the record between counsel was completed prior to that filing. The reason for Maj Golseth's withdrawal is because Lt Col Wilson is available to review SSgt Mabida's record of trial sooner than Maj Golseth. A copy of this motion will be sent to SSgt Mabida simultaneous to its filing.

WHEREFORE, undersigned counsel respectfully requests that this Honorable Court grant this motion.

Respectfully submitted,

[redacted]

SAMANTHA P. GOLSETH, Maj, USAF
Appellate Defense Counsel

[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 27 February 2025.

Respectfully submitted,

[redacted]

SAMANTHA P. GOLSETH, Maj, USAF
Appellate Defense Counsel
[redacted]

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (FIFTH)**
v.	)	
	)	Before Panel No. 1
Staff Sergeant (E-5) **JOHN ANDRE N. MABIDA,** United States Air Force, *Appellant.*	)	No. ACM 40682
	)	7 April 2025

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Staff Sergeant (SSgt) John Andre N. Mabida moves for an enlargement of time to file his assignments of error. A.F. CT. CRIM. APP. R. 23.3(m)(3) and 23.3(m)(6). SSgt Mabida requests an enlargement for a period of 30 days, which will end on **18 May 2025**. SSgt Mabida's case was docketed with this Court on 27 June 2024. From the date of docketing to the present date, 284 days have elapsed. From the date of docketing to the date requested, 325 days will have elapsed. On 20 September 2024, this Court received SSgt Mabida's record of trial, beginning the time-period for SSgt Mabida to file his assignments of error. JT. CT. CRIM. APP. R. 18(d)(2). From the date this Court received the record to the present date, 199 days have elapsed. From the date this Court received the record to the date requested, 240 days will have elapsed.

SSgt Mabida was convicted by officer and enlisted members convened at a general court-martial, contrary to his pleas, of violating one charge and specification of Article 128b, Uniform Code of Military Justice (UCMJ), domestic violence. Entry of Judgment, 15 November 2023.[1] The military judge sentenced SSgt Mabida to four months' confinement, reduction in pay grade to

[1] Two specifications of domestic violence were withdrawn and dismissed without prejudice as a result of a mistrial. *Id*. Consistent with SSgt Mabida's pleas, the members found him not guilty of one charge and specification of sexual assault, one charge and specification of larceny, and five specifications of domestic violence, in alleged violation of Articles 120, 121, and 128b. *Id*.

E-2, forfeiture of $500.00 pay per month for four months, and a reprimand. Statement of Trial Results, 16 September 2023. The convening authority took no action on the findings or sentence. Convening Authority Decision on Action, 17 October 2023. The record of trial includes 9 prosecution exhibits, 20 defense exhibits, 44 appellate exhibits, 1 court exhibit, and 997 pages of transcript. SSgt Mabida is not confined. Through no fault of SSgt Mabida, undersigned counsel has been working on other assigned matters and has yet to complete her review of his case. This enlargement of time is necessary to allow undersigned counsel to fully review his case and advise him regarding potential errors. SSgt Mabida was advised of his right to a timely appeal. He was provided an update of the status of undersigned counsel's progress on his case. He was advised of this request for an enlargement of time, and he agrees with this request for an enlargement of time.

Undersigned counsel currently represents 6 clients and is presently assigned 5 cases pending initial brief before this Court. As of the date of this filing undersigned counsel has not yet reviewed the record of trial in the instant case. Four cases currently have priority over the present case:

1. *Hymel*, No. ACM 40627 – 634 pages – presently on EOT 7. Counsel is in the process of reviewing the record. The record of trial consists of five volumes. There are five prosecution exhibits, eight defense exhibits, and 18 appellate exhibits. Capt Hymel is not currently confined.

2. *Nelson*, No. ACM 24042 – 336 pages – presently on EOT 4 – The record of trial is three volumes consisting of 15 prosecution exhibits, one defense exhibit, and 17 appellate exhibits; the transcript is 336 pages. Appellant is not currently confined. Undersigned counsel has not yet begun reviewing the record of trial in this case.

3. *Hahn*, No. ACM 40657 – 81 pages – presently on EOT 4 - The record of trial consists of three volumes with four prosecution exhibits, one court exhibit, seven defense exhibits, and five appellate exhibits; the transcript is 81 pages. Appellant is currently confined.

4. *Corliss*, No. ACM 40656 – 402 pages – presently on EOT 3 - The trial transcript is 88 pages long and the record of trial (ROT) is an electronic ROT, which is one volume of 402 pages. There are five admitted Prosecution Exhibits, six Defense Exhibits, and one Appellate Exhibit. Appellant is not currently confined.

WHEREFORE, SSgt Mabida respectfully requests this Honorable Court grant the requested enlargement of time.

Respectfully submitted,

[redacted]

LUKE D. WILSON, Lt Col, USAF
Appellate Defense Counsel
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 7 April 2025.

Respectfully submitted,

LUKE D. WILSON, Lt Col, USAF
Appellate Defense Counsel
[redacted]

1IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME
v.	)	
	)	Before Panel No. 1
Staff Sergeant (E-5) **JOHN ANDRE N. MABIDA,** United States Air Force, *Appellant.*	)	No. ACM 40682
	)	8 April 2025

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States hereby enters its general opposition to Appellant's Motion for Enlargement of Time to file an Assignment of Error in this case.

WHEREFORE, the United States respectfully requests that this Court deny Appellant's enlargement motion.

[redacted]
VANESSA BAIROS, Maj, USAF
Appellate Government Counsel
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 8 April 2025.

VANESSA BAIROS, Maj, USAF
Appellate Government Counsel
[redacted]

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (SIXTH)**
v.	)	
	)	Before Panel No. 1
Staff Sergeant (E-5) **JOHN ANDRE N. MABIDA,** United States Air Force, *Appellant.*	)	No. ACM 40682
	)	5 May 2025

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Staff Sergeant (SSgt) John Andre N. Mabida moves for an enlargement of time to file his assignments of error. A.F. CT. CRIM. APP. R. 23.3(m)(3) and 23.3(m)(6). SSgt Mabida requests an enlargement for a period of 30 days, which will end on **17 June 2025**. SSgt Mabida's case was docketed with this Court on 27 June 2024. From the date of docketing to the present date, 312 days have elapsed. From the date of docketing to the date requested, 355 days will have elapsed. On 20 September 2024, this Court received SSgt Mabida's record of trial, beginning the time-period for SSgt Mabida to file his assignments of error. JT. CT. CRIM. APP. R. 18(d)(2). From the date this Court received the record to the present date, 227 days have elapsed. From the date this Court received the record to the date requested, 270 days will have elapsed.

SSgt Mabida was convicted by officer and enlisted members convened at a general court-martial, contrary to his pleas, of violating one charge and specification of Article 128b, Uniform Code of Military Justice (UCMJ), domestic violence. Entry of Judgment, 15 November 2023.[1] The military judge sentenced SSgt Mabida to four months' confinement, reduction in pay grade to

[1] Two specifications of domestic violence were withdrawn and dismissed without prejudice as a result of a mistrial. *Id*. Consistent with SSgt Mabida's pleas, the members found him not guilty of one charge and specification of sexual assault, one charge and specification of larceny, and five specifications of domestic violence, in alleged violation of Articles 120, 121, and 128b. *Id*.

E-2, forfeiture of $500.00 pay per month for four months, and a reprimand. Statement of Trial Results, 16 September 2023. The convening authority took no action on the findings or sentence. Convening Authority Decision on Action, 17 October 2023. The record of trial includes 9 prosecution exhibits, 20 defense exhibits, 44 appellate exhibits, 1 court exhibit, and 997 pages of transcript. SSgt Mabida is not confined. Through no fault of SSgt Mabida, undersigned counsel has been working on other assigned matters and has yet to complete her review of his case. This enlargement of time is necessary to allow undersigned counsel to fully review his case and advise him regarding potential errors. SSgt Mabida was advised of his right to a timely appeal. He was provided an update of the status of undersigned counsel's progress on his case. He was advised of this request for an enlargement of time, and he agrees with this request for an enlargement of time.

Undersigned counsel currently represents 6 clients and is presently assigned 5 cases pending initial brief before this Court. As of the date of this filing undersigned counsel has not yet reviewed the record of trial in the instant case. Four cases currently have priority over the present case:

1. *Hymel*, No. ACM 40627 – 634 pages – presently on EOT 8. Counsel has drafted the AOE and it is being reviewed. The record of trial consists of five volumes. There are five prosecution exhibits, eight defense exhibits, and 18 appellate exhibits. Capt Hymel is not currently confined.

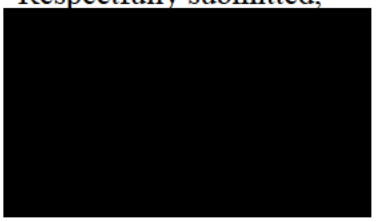
2. *Nelson*, No. ACM 24042 – 336 pages – presently on EOT 7 – The record of trial is three volumes consisting of 15 prosecution exhibits, one defense exhibit, and 17 appellate exhibits; the transcript is 336 pages. Appellant is not currently confined. Undersigned counsel has reviewed the record and is drafting the AOE.

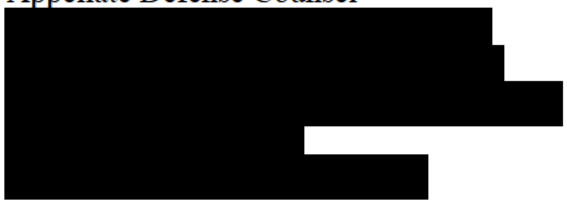
3. *Hahn*, No. ACM 40657 – 81 pages – presently on EOT 7 - The record of trial consists of three volumes with four prosecution exhibits, one court exhibit, seven defense exhibits, and five appellate exhibits; the transcript is 81 pages. Appellant is currently confined. Undersigned counsel has not yet reviewed the record.

4. *Corliss*, No. ACM 40656 – 402 pages – presently on EOT 7 - The trial transcript is 88 pages long and the record of trial (ROT) is an electronic ROT, which is one volume of 402 pages. There are five admitted Prosecution Exhibits, six Defense Exhibits, and one Appellate Exhibit. Appellant is not currently confined. Appellant is currently confined. Undersigned counsel has not yet reviewed the record.

WHEREFORE, SSgt Mabida respectfully requests this Honorable Court grant the requested enlargement of time.

Respectfully submitted,



LUKE D. WILSON, Lt Col, USAF
Appellate Defense Counsel


CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 5 May 2025.

Respectfully submitted,

LUKE D. WILSON, Lt Col, USAF
Appellate Defense Counsel
[redacted]

1IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME
v.	)	
	)	Before Panel No. 1
Staff Sergeant (E-5) **JOHN ANDRE N. MABIDA,** United States Air Force, *Appellant.*	)	No. ACM 40682
	)	7 May 2025

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States hereby enters its general opposition to Appellant's Motion for Enlargement of Time to file an Assignment of Error in this case.

WHEREFORE, the United States respectfully requests that this Court deny Appellant's enlargement motion.

[redacted]

JOCELYN Q. WRIGHT, Maj, USAF
Appellate Government Counsel
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 7 May 2025.

JOCELYN Q. WRIGHT, Maj, USAF
Appellate Government Counsel
[redacted]

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (SEVENTH)**
v.	)	
	)	Before Panel No. 1
Staff Sergeant (E-5) **JOHN ANDRE N. MABIDA,** United States Air Force, *Appellant.*	)	No. ACM 40682
	)	9 June 2025

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Staff Sergeant (SSgt) John Andre N. Mabida moves for an enlargement of time to file his assignments of error. A.F. CT. CRIM. APP. R. 23.3(m)(3) and 23.3(m)(6). SSgt Mabida requests an enlargement for a period of 30 days, which will end on **17 July 2025**. SSgt Mabida's case was docketed with this Court on 27 June 2024. From the date of docketing to the present date, 347 days have elapsed. From the date of docketing to the date requested, 385 days will have elapsed. On 20 September 2024, this Court received SSgt Mabida's record of trial, beginning the time-period for SSgt Mabida to file his assignments of error. JT. CT. CRIM. APP. R. 18(d)(2). From the date this Court received the record to the present date, 262 days have elapsed. From the date this Court received the record to the date requested, 300 days will have elapsed.

SSgt Mabida was convicted by officer and enlisted members convened at a general court-martial, contrary to his pleas, of violating one charge and specification of Article 128b, Uniform Code of Military Justice (UCMJ), domestic violence. Entry of Judgment, 15 November 2023.[1] The military judge sentenced SSgt Mabida to four months' confinement, reduction in pay grade to

[1] Two specifications of domestic violence were withdrawn and dismissed without prejudice as a result of a mistrial. *Id*. Consistent with SSgt Mabida's pleas, the members found him not guilty of one charge and specification of sexual assault, one charge and specification of larceny, and five specifications of domestic violence, in alleged violation of Articles 120, 121, and 128b. *Id*.

E-2, forfeiture of $500.00 pay per month for four months, and a reprimand. Statement of Trial Results, 16 September 2023. The convening authority took no action on the findings or sentence. Convening Authority Decision on Action, 17 October 2023. The record of trial includes 9 prosecution exhibits, 20 defense exhibits, 44 appellate exhibits, 1 court exhibit, and 997 pages of transcript. SSgt Mabida is not confined. Through no fault of SSgt Mabida, undersigned counsel has been working on other assigned matters and has yet to complete review of the case. This enlargement of time is necessary to allow undersigned counsel to fully review the case and advise Appellant regarding potential errors. SSgt Mabida was advised of the right to a timely appeal. Appellant was provided an update of the status of undersigned counsel's progress on his case. Appellant was advised of this request for an enlargement of time, and agrees with this request for an enlargement of time.

Undersigned counsel currently represents 7 clients and is presently assigned 3 cases pending initial brief before this Court. As of the date of this filing undersigned counsel has not yet reviewed the record of trial in the instant case. Two cases currently have priority over the present case:

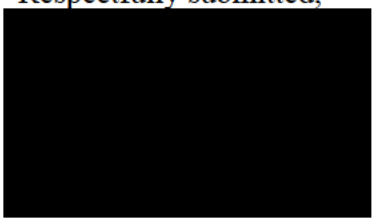
1. *Smith*, No. ACM 40437 (f rev) – 338 pages – presently on EOT 11. The trial transcript is 338 pages long and the record of trial (ROT) consists of four volumes. There are seven admitted Prosecution Exhibits, ten Defense Exhibits, and twenty-nine Appellate Exhibits. Appellant is not currently confined. Undersigned counsel has not yet reviewed the record.

4. *Corliss*, No. ACM 40656 – 402 pages – presently on EOT 7 - The trial transcript is 88 pages long and the record of trial (ROT) is an electronic ROT, which is one volume of 402 pages. There are five admitted Prosecution Exhibits, six Defense Exhibits, and one

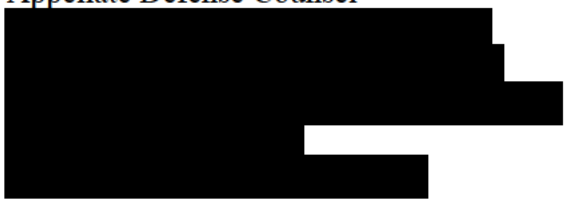
Appellate Exhibit. Appellant is not currently confined. Undersigned counsel has reviewed the record and is drafting the AOE.

WHEREFORE, SSgt Mabida respectfully requests this Honorable Court grant the requested enlargement of time.

Respectfully submitted,



LUKE D. WILSON, Lt Col, USAF
Appellate Defense Counsel



CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 9 June 2025.

Respectfully submitted,

LUKE D. WILSON, Lt Col, USAF
Appellate Defense Counsel
[redacted]

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME
v.	)	
	)	Before Panel No. 1
Staff Sergeant (E-5) **JOHN ANDRE N. MABIDA,** United States Air Force, *Appellant.*	)	No. ACM 40682
	)	10 June 2025

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States hereby enters its opposition to Appellant's Motion for Enlargement of Time to file an Assignment of Error in this case.

The United States respectfully maintains that short of a death penalty case or other extraordinary circumstances, it should not take any appellant nearly a year to submit an assignment of error to this Court. If Appellant's new delay request is granted, the defense delay in this case will be 300 days in length. Appellant's nearly year-long delay practically ensures this Court will not be able to issue a decision that complies with our superior Court's appellate processing standards. Appellant has already consumed almost two thirds of the 18-month standard for this Court to issue a decision, which only leaves about 8 months combined for the United States and this Court to perform their separate statutory responsibilities. It appears that Appellant's counsel has not completed review of the record of trial at this late stage of the appellate process.

WHEREFORE, the United States respectfully requests that this Court deny Appellant's enlargement motion.

[redacted]
JO USAF
Appellate Government Counsel
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 10 June 2025.

[redacted]

JOCELYN Q. WRIGHT, Maj, USAF
Appellate Government Counsel
[redacted]

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (EIGHTH)**
v.	)	
	)	Before Panel No. 1
Staff Sergeant (E-5) **JOHN ANDRE N. MABIDA,** United States Air Force, *Appellant.*	)	No. ACM 40682
	)	3 July 2025

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Staff Sergeant (SSgt) John Andre N. Mabida moves for an enlargement of time to file his assignments of error. A.F. CT. CRIM. APP. R. 23.3(m)(3) and 23.3(m)(6). SSgt Mabida requests an enlargement for a period of 30 days, which will end on **16 August 2025**. SSgt Mabida's case was docketed with this Court on 27 June 2024. From the date of docketing to the present date, 371 days have elapsed. From the date of docketing to the date requested, 415 days will have elapsed. On 20 September 2024, this Court received SSgt Mabida's record of trial, beginning the time-period for SSgt Mabida to file his assignments of error. JT. CT. CRIM. APP. R. 18(d)(2). From the date this Court received the record to the present date, 286 days have elapsed. From the date this Court received the record to the date requested, 330 days will have elapsed.

SSgt Mabida was convicted by officer and enlisted members convened at a general court-martial, contrary to his pleas, of violating one charge and specification of Article 128b, Uniform Code of Military Justice (UCMJ), domestic violence. Entry of Judgment, 15 November 2023.[1] The military judge sentenced SSgt Mabida to four months' confinement, reduction in pay grade to

[1] Two specifications of domestic violence were withdrawn and dismissed without prejudice as a result of a mistrial. *Id*. Consistent with SSgt Mabida's pleas, the members found him not guilty of one charge and specification of sexual assault, one charge and specification of larceny, and five specifications of domestic violence, in alleged violation of Articles 120, 121, and 128b. *Id*.

E-2, forfeiture of $500.00 pay per month for four months, and a reprimand. Statement of Trial Results, 16 September 2023. The convening authority took no action on the findings or sentence. Convening Authority Decision on Action, 17 October 2023. The record of trial includes 9 prosecution exhibits, 20 defense exhibits, 44 appellate exhibits, 1 court exhibit, and 997 pages of transcript. SSgt Mabida is not confined. Through no fault of SSgt Mabida, undersigned counsel has been working on other assigned matters and has yet to complete review of the case. This enlargement of time is necessary to allow undersigned counsel to fully review the case and advise Appellant regarding potential errors. SSgt Mabida was advised of the right to a timely appeal. Appellant was provided an update of the status of undersigned counsel's progress on his case. Appellant was advised of this request for an enlargement of time, and agrees with this request for an enlargement of time.

Undersigned counsel currently represents 7 clients and is presently assigned 6 cases pending initial brief before this Court. As of the date of this filing undersigned counsel has not yet reviewed the record of trial in the instant case. Two cases currently have priority over the present case:

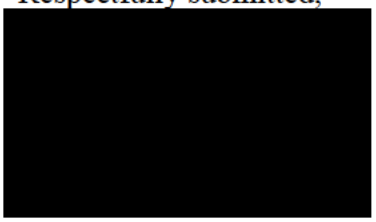
1. *Smith*, No. ACM 40437 (f rev) – 338 pages – presently on EOT 12. The trial transcript is 338 pages long and the record of trial (ROT) consists of four volumes. There are seven admitted Prosecution Exhibits, ten Defense Exhibits, and twenty-nine Appellate Exhibits. Appellant is not currently confined. Undersigned counsel has not yet reviewed the record.

4. *Corliss*, No. ACM 40656 – 402 pages – presently on EOT 8 - The trial transcript is 88 pages long and the record of trial (ROT) is an electronic ROT, which is one volume of 402 pages. There are five admitted Prosecution Exhibits, six Defense Exhibits, and one

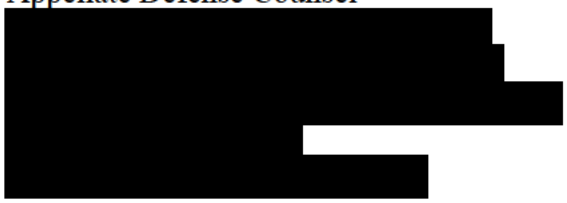
Appellate Exhibit. Appellant is not currently confined. Undersigned counsel has reviewed the record and is drafting the AOE.

WHEREFORE, SSgt Mabida respectfully requests this Honorable Court grant the requested enlargement of time.

Respectfully submitted,



LUKE D. WILSON, Lt Col, USAF
Appellate Defense Counsel



CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 3 July 2025.

Respectfully submitted,

LUKE D. WILSON, Lt Col, USAF
Appellate Defense Counsel
[redacted]

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME
v.	)	
	)	Before Panel No. 1
Staff Sergeant (E-5) **JOHN ANDRE N. MABIDA,** United States Air Force, *Appellant.*	)	No. ACM 40682
	)	8 July 2025

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States hereby enters its opposition to Appellant's Motion for Enlargement of Time to file an Assignment of Error in this case.

The United States respectfully maintains that short of a death penalty case or other extraordinary circumstances, it should not take any appellant nearly a year to submit an assignment of error to this Court. If Appellant's new delay request is granted, the defense delay in this case will be 330 days in length. Appellant's nearly year-long delay practically ensures this Court will not be able to issue a decision that complies with our superior Court's appellate processing standards. Appellant has already consumed almost two thirds of the 18-month standard for this Court to issue a decision, which only leaves about 7 months combined for the United States and this Court to perform their separate statutory responsibilities. It appears that Appellant's counsel has not completed review of the record of trial at this late stage of the appellate process.

WHEREFORE, the United States respectfully requests that this Court deny Appellant's enlargement motion.

KATE E. LEE, Maj, USAF
Appellate Government Counsel
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 8 July 2025.

KATE E. LEE, Maj, USAF
Appellate Government Counsel
[redacted]

IN THE UNITED STATES AIR FORCE OF CRIMINAL APPEALS

UNITED STATES,
Appellee,

v.

Staff Sergeant (E-5)
JOHN A. MABIDA,
United States Air Force,
Appellant

BRIEF ON BEHALF OF APPELLANT

Before Panel No. 1

No. ACM 40682

4 August 2025

TO THE HONORABLE, THE JUDGES OF THE
UNITED STATES AIR FORCE OF CRIMINAL APPEALS

The undersigned enters an appearance as appellate defense counsel in the above-captioned case. I hereby certify that I am admitted to practice before this Court.

[redacted]
SCOTT R. HOCKENBERRY
Civilian Appellate Defense Counsel
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 4 August 2025.

Respectfully submitted,

LUKE D. WILSON, Lt Col, USAF
Appellate Defense Counsel
[redacted]

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (NINTH)**
v.	)	
	)	Before Panel No. 1
Staff Sergeant (E-5) **JOHN ANDRE N. MABIDA,** United States Air Force, *Appellant.*	)	No. ACM 40682
	)	5 August 2025

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Staff Sergeant (SSgt) John Andre N. Mabida moves for an enlargement of time to file his assignments of error. A.F. CT. CRIM. APP. R. 23.3(m)(3) and 23.3(m)(6). SSgt Mabida requests an enlargement for a period of 30 days, which will end on **15 September 2025**. SSgt Mabida's case was docketed with this Court on 27 June 2024. From the date of docketing to the present date, 404 days have elapsed. From the date of docketing to the date requested, 445 days will have elapsed. On 20 September 2024, this Court received SSgt Mabida's record of trial, beginning the time-period for SSgt Mabida to file his assignments of error. JT. CT. CRIM. APP. R. 18(d)(2). From the date this Court received the record to the present date, 319 days have elapsed. From the date this Court received the record to the date requested, 360 days will have elapsed.

SSgt Mabida was convicted by officer and enlisted members convened at a general court-martial, contrary to his pleas, of violating one charge and specification of Article 128b, Uniform Code of Military Justice (UCMJ), domestic violence. Entry of Judgment, 15 November 2023.[1] The military judge sentenced SSgt Mabida to four months' confinement, reduction in pay grade to

[1] Two specifications of domestic violence were withdrawn and dismissed without prejudice as a result of a mistrial. *Id*. Consistent with SSgt Mabida's pleas, the members found him not guilty of one charge and specification of sexual assault, one charge and specification of larceny, and five specifications of domestic violence, in alleged violation of Articles 120, 121, and 128b. *Id*.

E-2, forfeiture of $500.00 pay per month for four months, and a reprimand. Statement of Trial Results, 16 September 2023. The convening authority took no action on the findings or sentence. Convening Authority Decision on Action, 17 October 2023. The record of trial includes 9 prosecution exhibits, 20 defense exhibits, 44 appellate exhibits, 1 court exhibit, and 997 pages of transcript. SSgt Mabida is not confined. Through no fault of SSgt Mabida, undersigned counsel has been working on other assigned matters and has yet to complete review of the case. This enlargement of time is necessary to allow undersigned counsel to fully review the case and advise Appellant regarding potential errors. SSgt Mabida was advised of the right to a timely appeal. Appellant was provided an update of the status of undersigned counsel's progress on his case. Appellant was advised of this request for an enlargement of time, and agrees with this request for an enlargement of time.

Undersigned military counsel currently represents 7 clients and is presently assigned 6 cases pending initial brief before this Court. As of the date of this filing undersigned counsel has not yet reviewed the record of trial in the instant case. Two cases currently have priority over the present case:

1. *Smith*, No. ACM 40437 (f rev) – 338 pages – presently on EOT 12. The trial transcript is 338 pages long and the record of trial (ROT) consists of four volumes. There are seven admitted Prosecution Exhibits, ten Defense Exhibits, and twenty-nine Appellate Exhibits. Appellant is not currently confined. Undersigned counsel is in the process of reviewing the record.

4. *Corliss*, No. ACM 40656 – 402 pages – presently on EOT 8 - The trial transcript is 88 pages long and the record of trial (ROT) is an electronic ROT, which is one volume of 402 pages. There are five admitted Prosecution Exhibits, six Defense Exhibits, and one

Appellate Exhibit. Appellant is not currently confined. Undersigned counsel has reviewed the record and is drafting the AOE.

Civilian appellate counsel is also representing Appellant. Counsel, Mr. Scott Hockenberry, represents 14 appellate clients and is presently assigned to four cases pending before this Court. Appellant's case is Mr. Hockenberry's first priority before this Court. Mr. Hockenberry is in the process of reviewing the record of trial.

WHEREFORE, SSgt Mabida respectfully requests this Honorable Court grant the requested enlargement of time.

Respectfully submitted,

[redacted]

LUKE D. WILSON, Lt Col, USAF
Appellate Defense Counsel

[redacted]

[redacted]

(For) SCOTT HOCKENBERRY
Attorney-At-Law

[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 5 August 2025.

Respectfully submitted,

LUKE D. WILSON, Lt Col, USAF
Appellate Defense Counsel
[redacted]

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME
v.	)	
	)	Before Panel No. 1
Staff Sergeant (E-5) **JOHN ANDRE N. MABIDA,** United States Air Force, *Appellant.*	)	No. ACM 40682
	)	6 August 2025

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States hereby enters its opposition to Appellant's Motion for Enlargement of Time to file an Assignment of Error in this case.

The United States respectfully maintains that short of a death penalty case or other extraordinary circumstances, it should not take any appellant nearly a year to submit an assignment of error to this Court. If Appellant's new delay request is granted, the defense delay in this case will be 360 days in length. Appellant's nearly year-long delay practically ensures this Court will not be able to issue a decision that complies with our superior Court's appellate processing standards. Appellant has already consumed almost two thirds of the 18-month standard for this Court to issue a decision, which only leaves about 6 months combined for the United States and this Court to perform their separate statutory responsibilities. It appears that Appellant's counsel has not completed review of the record of trial at this late stage of the appellate process.

WHEREFORE, the United States respectfully requests that this Court deny Appellant's enlargement motion.

[redacted]
VANESSA BAIROS, Maj, USAF
Appellate Government Counsel
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 6 August 2025.

[redacted]
VANESSA BAIROS, Maj, USAF
Appellate Government Counsel
[redacted]

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40682**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
John A. MABIDA	)	
Staff Sergeant (E-5)	)	
U.S. Air Force	)	
Appellant	)	**Panel 1**

On 12 August 2025, counsel for Appellant submitted a Consent Motion to Examine Sealed Materials. Specifically, Appellant requests counsel for both parties be permitted to examine the following materials sealed by the military judge: Appellate Exhibits (A.E.) XIV–XVIII and XX–XXI; and transcript pages 48–75. These materials were viewed by trial counsel and trial defense counsel at trial.

Appellate counsel may examine sealed materials released to counsel at trial "upon a colorable showing . . . that examination is reasonably necessary to a proper fulfillment of the appellate counsel's responsibilities." Rule for Courts-Martial (R.C.M.) 1113(b)(3)(B)(i), *Manual for Courts-Martial, United States* (2024 ed.).

Our review of the record revealed that A.E. XXI is missing. The sealed envelope for A.E. XXI includes a duplicate copy of A.E. XXII, an exhibit not ordered sealed by the military judge.

"Whether a record is complete and a transcript is verbatim are questions of law that this [c]ourt reviews de novo." *United States v. Davenport*, 73 M.J. 373, 376 (C.A.A.F. 2014) (citation omitted). A record of trial must include items listed in R.C.M. 1112(b)(1)–(8). R.C.M. 1112(b)(5) specifies appellate exhibits are required to be included in the record of trial.

The court has considered Appellant's motion, the Government's consent, and this court's Rules of Practice and Procedure. The court finds Appellant's counsel has made a colorable showing that review of the sealed materials is necessary to fulfill counsel's responsibilities.

Accordingly, it is by the court on this 15th day of August, 2025,

ORDERED:

Appellant's Consent Motion to Examine Sealed Materials dated 12 August 2025 is **GRANTED IN PART**.

Appellate defense counsel and appellate government counsel may examine **A.E. XIV–XVIII, A.E. XX, and transcript pages 48–75**, subject to the following conditions:

To examine the sealed materials, counsel will coordinate with the court.

No counsel granted access to the sealed materials may photocopy, photograph, or otherwise reproduce this material and will not disclose or make available its contents to any other individual without this court's prior written authorization.

It is further ordered:

Not later than **28 August 2025**, counsel for the Government shall **SHOW GOOD CAUSE** as to why this court should not remand the record of trial for correction, to include insertion of A.E. XXI and any other corrective action deemed necessary.

FOR THE COURT

CAROL K. JOYCE
Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**CONSENT MOTION TO EXAMINE SEALED MATERIALS**
v.	)	
	)	Before Panel No. 1
Staff Sergeant (E-5) **JOHN A. MABIDA,** United States Air Force, *Appellant.*	)	No. ACM 40682
	)	12 August 2025

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Pursuant to Rules 3.1, 23.1(b), and 23.3(f) of this Honorable Court's Rules of Practice and Procedure, undersigned counsel hereby moves this Court to permit appellate counsel for the Appellant and the Government to examine those sealed materials that were available to the trial and defense counsel at the trial level. This includes the following sealed materials in Appellant's record of trial:

1) Appellate Exhibit XIV;
2) Appellate Exhibit XV;
3) Appellate Exhibit XVI;
4) Appellate Exhibit XVII;
5) Appellate Exhibit XVIII;
6) Appellate Exhibit XX;
7) Appellate Exhibit XXI; and,
8) Trial Transcript pages 48-75.

Facts

SSgt Mabida was convicted by officer and enlisted members convened at a general court-martial, contrary to his pleas, of violating one charge and specification of Article 128b, Uniform Code of Military Justice (UCMJ), domestic violence. Entry of Judgment, 15 November 2023.[1]

[1] Two specifications of domestic violence were withdrawn and dismissed without prejudice as a

The military judge sentenced SSgt Mabida to four months' confinement, reduction in pay grade to E-2, forfeiture of $500.00 pay per month for four months, and a reprimand. Statement of Trial Results, 16 September 2023. The convening authority took no action on the findings or sentence. Convening Authority Decision on Action, 17 October 2023.

During the proceedings, both the Government and the Defense moved to admit MRE 412 materials. The military judge sealed the exhibits and the corresponding transcript pages. The sealed Appellate Exhibits consist of the motions to admit the materials, the parties' responses to the motions (including victim's counsel), and the military judge's order on the motion. Thus, these materials were available to the parties at trial and reviewed by them.

Law

Pursuant to Rule for Court Martial (R.C.M.) 1113(b)(3)(B)(i), "materials presented or reviewed at trial and sealed . . . may be examined by appellate counsel upon a colorable showing to the reviewing or appellate authority that examination is reasonably necessary to a proper fulfillment of the appellate counsel's responsibilities[.]"

> Although Courts of Criminal Appeals have a broad mandate to review the record unconstrained by an appellant's assignments of error, that broad mandate does not reduce the importance of adequate representation. As we said in *United States v. Ortiz*, 24 M.J. 323, 325 (C.M.A. 1987), independent review is not the same as competent appellate representation.

United States v. May, 47 M.J. 478, 481 (C.A.A.F. 1998).

Air Force regulations governing professional duties and conduct of appellate defense counsel impose upon counsel, *inter alia*, a duty to provide "competent representation,"[2] perform

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result of a mistrial. *Id*. Consistent with SSgt Mabida's pleas, the members found him not guilty of one charge and specification of sexual assault, one charge and specification of larceny, and five specifications of domestic violence, in alleged violation of Articles 120, 121, and 128b. *Id*.

[2] Air Force Instruction (AFI) 51-110, *Professional Responsibility Program*, Attachment 2: Air Force Rules of Professional Conduct, Rule 1.1 (11 Dec. 2018).

"reasonable diligence,"[3] and to "give a client his or her best professional evaluation of the questions that might be presented on appeal…[to] consider all issues that might affect the validity of the judgment of conviction and sentence…[to] advise on the probable outcome of a challenge to the conviction or sentence...[and to] endeavor to persuade the client to abandon a wholly frivolous appeal or to eliminate contentions lacking in substance."[4] These requirements are generally consistent with those imposed by every state bar.

This Court may grant relief "on the basis of the entire record" of trial. Article 66, UCMJ, 10 U.S.C. § 866. Appellate defense counsel detailed by the Judge Advocate General shall represent accused servicemembers before this Court. Article 70, UCMJ, 10 U.S.C. § 870.

Analysis

The parties reviewed the sealed material at trial. It is reasonably necessary for Appellant's counsel to review these sealed exhibits and associated transcript pages in order for counsel to competently conduct a professional evaluation of Appellant's case and to uncover all issues which might afford him relief. Because examination of the material in question is reasonably necessary to the fulfillment of counsel's Article 70, UCMJ, duties, and because the contents were made available to the parties at trial, Appellant has provided the "colorable showing" required by R.C.M. 1113(b)(3)(B)(i) to permit his counsel's examination of the sealed material and has shown good cause to grant this motion.

The Government consents to both parties viewing the sealed material detailed above.

WHEREFORE, Appellant respectfully requests that this Honorable Court grant this consent motion and permit appellate counsel for the Appellant and the Government to examine the aforementioned sealed material contained within the original record of trial.

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[3] *Id*. at Rule 1.3.
[4] AFI 51-110, Attachment 7: Air Force Standards for Criminal Justice, Standard 4-8.3(b).

Respectfully submitted,

[redacted]

LUKE D. WILSON, Lt Col, USAF
Appellate Defense Counsel
[redacted]

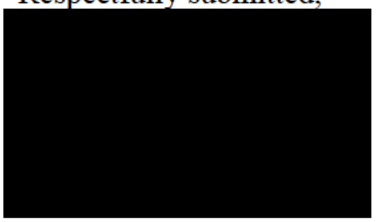
[redacted]

(For) SCOTT HOCKENBERRY
Attorney-At-Law
[redacted]

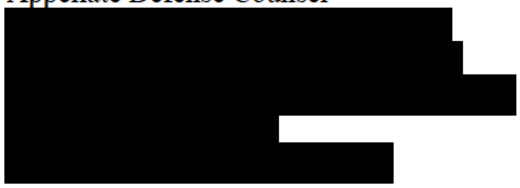
CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Air Force Government Trial and Appellate Operations Division on 12 August 2025.

Respectfully submitted,



LUKE D. WILSON, Lt Col, USAF
Appellate Defense Counsel



IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	UNITED STATES' RESPONSE TO ORDER TO SHOW CAUSE
v.	)	
	)	Before Panel No. 1
Staff Sergeant (E-5) **JOHN A. MABIDA**, United States Air Force, *Appellant.*	)	ACM 40682 26 August 2025

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Contrary to his pleas, Appellant was convicted by a general court-martial of one charge and one specification of domestic violence, in violation of Article 128b, UCMJ. (*Entry of Judgment*, dated 15 November 2023, ROT, Vol. 1.)

On 12 August 2025, Appellant submitted a Consent Motion to Examine Sealed Materials, requesting appellate counsel for the parties be allowed to examine Appellate Exhibits XIV-XVIII and XX-XXI. This Court granted Appellant's request to examine the above-referenced materials. (*Order*, dated 15 August 2025). In this Court's order, the Court *sua sponte* identified that Appellate Exhibit XXI was missing. This Court then directed the following: "[n]ot later than 28 August 2025, counsel for the Government shall **SHOW GOOD CAUSE** as to why this [C]ourt should not remand the record of trial for correction." (Id.)

To be considered complete, the record of trial must have all the exhibits. R.C.M. 1112(b)(5)). When a record is incomplete, Rule for Court-Martial (R.C.M.) 1112(d)(2) allows this Court to return the record of trial to the military judge for correction. Since Appellate Exhibit XXI is missing from the record and involves sealed materials, the government acknowledges that this case should be remanded for correction under R.C.M. 1112(d).

WHEREFORE, the United States respectfully requests that this Court remand the record for correction.

KATE E. LEE, Maj, USAF
Appellate Government Counsel

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 26 August 2025.

KATE E. LEE, Maj, USAF
Appellate Government Counsel
[redacted]

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) **JOHN A. MABIDA**, United States Air Force, *Appellant.*	)))))))))	MOTION FOR ENLARGEMENT OF TIME (FIRST) OUT OF TIME Before Panel No. 1 ACM 40682 24 September 2025

TO THE HONORABLE, THE JUDGES OF
THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Pursuant to Rule 23.3(m)(1) of this Court's Rules of Practice and Procedure, the United States respectfully requests that it be granted an enlargement of time out of time of 7 days, until 1 October 2025, to return the record in this case to this Court. This is the first request for an enlargement of time for this remand, and as of the date of this request, 454 days have elapsed since docketing. On the date requested, 462 days will have elapsed.

This case was docketed with the Court on 27 June 2024. (*Notice of Docketing*, 27 June 2024.) On 2 September 2025, this Court remanded the record of trial in this case to the Air Force Trial Judiciary to correct the omission of Appellate Exhibit XXI. (*Remand Order*, 2 September 2025.) The corrected record of trial was shipped on 18 September 2025 via the United States Postal Service and is still in transit. This enlargement of time is being requested out of time because while the United States was originally optimistic about meeting this Court's deadline, it now appears that the record of trial may not make it to the Military Justice and Policy Division (JAJM) in time for service before the Court closes today. To err on the side of caution, an additional week to comply is being requested.

WHEREFORE, the United States respectfully requests that this Court grant this enlargement motion.

[redacted]

KATE E. LEE, Maj, USAF
Appellate Government Counsel
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 24 September 2025.

KATE E. LEE, Maj, USAF
Appellate Government Counsel
[redacted]

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40682 (f rev)**
Appellee	)	
	)	
v.	)	
	)	**NOTICE OF**
John Andre N. MABIDA	)	**DOCKETING**
Staff Sergeant (E-5)	)	
U.S. Air Force	)	
Appellant	)	

The record of trial in the above-styled case was returned to this court by the Military Appellate Records Branch (JAJM).

Accordingly, it is by the court on this 3d day of October, 2025,

ORDERED:

That the Record of Trial in the above styled matter is referred to Panel 1.

The court's order of 15 August 2025 authorizing counsel to view sealed materials is still in effect, along with Appellate Exhibit XXI, applying the same rules as outlined in the 15 August 2025 order.

Based on the procedural history of this case, further requests for enlargements of time may necessitate a status conference.

FOR THE COURT

[redacted]

JACOB B. HOEFERKAMP, Capt, USAF
Chief Commissioner

IN THE UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES,
Appellee,

v.

Staff Sergeant (E-5)
JOHN ANDRE N. MABIDA,
United States Air Force,
Appellant

BRIEF ON BEHALF OF APPELLANT

Before Panel No. 1

No. ACM 40682

6 NOV 2025

TO THE HONORABLE, THE JUDGES OF THE
UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

Assignments of Error

I. WHETHER THE MILITARY JUDGE ERRED BY DENYING APPELLANT'S REQUEST FOR A SELF-DEFENSE INSTRUCTION.

II. WHETHER RELIEF IS WARRANTED FOR PERVASIVE IMPROPER EVIDENCE AND ARGUMENT.

III. WHETHER THE MILITARY JUDGE ERRED BY ALLOWING THE GOVERNMENT TO USE LEADING QUESTIONS IN ITS DIRECT EXAMINATION OF THE NAMED VICTIM AS A "REMEDY" FOR THE GOVERNMENT'S REPEATED ELICTING OF IMRPOPER EVIDENCE.

Statement of the Case

On 4 November 2022 and 8-15 September 2023, Appellant was tried by a General Court-Martial (Enlisted Panel) at Keesler Air Force Base, Mississippi. Appellant was convicted, contrary to his pleas, of one specification of domestic violence in violation of Article 128b, UCMJ, 10 U.S.C. § 928b. (R. at 933-34). The military judge declared a mistrial as to two additional specifications of domestic violence on the grounds of prosecutorial misconduct. (R. at 455, 500, 503-04). Appellant was acquitted of multiple other charges based on various allegations from his wife. (R. at 933-34).[1] Appellant was sentenced by the members to a reprimand, reduction to E-2, confinement for four months, and forfeiture of $500 per month for four months. (R. at 996). The convening authority took no action on the findings or sentence. (Convening Authority Decision on Action).

Statement of Facts

In the aftermath of the breakup of their marriage, Appellant's wife, YR, launched a barrage of accusations of sexual abuse, physical abuse, and larceny

[1] Of note, the oral findings announcement as to Charge III seems to have only included Specification 1, the sole guilty finding. (R. at 933-34). As reflected on the findings worksheet and the entry of judgement, the panel acquitted appellant of five additional specifications of Charge III. (App. Ex. XXXII; Entry of Judgement). It is unclear why the not guilty specifications were not announced but given that they are correctly reflected in the entry of judgement there does not seem to be any residual error for this Court to correct.

against him. *See* (Charge Sheet). Only one is particularly relevant to this appeal, however, because all the others resulted either in acquittal or dismissal. (Statement of Trial Results).

Appellant's sole conviction arises from his action of striking his wife in the body with his hand. (Charge Sheet; Statement of Trial Results). This allegation constituted Specification 1 of Charge III. Included in the underlying allegations was that Appellant hit his wife several times while he was driving and his wife was in the passenger seat. The defense conceded in opening this had occurred. (R. at 327-28, 336, 339). However, the defense theory was self-defense, on the basis that YR was hitting him first while he was driving and was trying to grab the steering wheel – and that Appellant had struck her to get her to stop this dangerous behavior. (R. at 327-28, 336).

Argument

I. WHETHER THE MILITARY JUDGE ERRED BY DENYING APPELLANT'S REQUEST FOR A SELF-DEFENSE INSTRUCTION.

Standard of Review

Whether an affirmative defense has been reasonably raised by evidence is a question of law appellate courts review de novo. *United States v. Davis*, 76 M.J. 224, 2299 (C.A.A.F. 2017) (citations omitted).

Additional Facts

At the very outset of opening statements, defense counsel conceded that the conduct charged in Specification 1 of Charge III had occurred. (R. at 327-28) ("No member of the defense team is going to stand up here and look you in the eye and tell you that Sergeant Mabida never laid hands on his wife. He did."). Defense counsel also introduced their self-defense theory in the initial portion of opening. (R. at 328) ("But you're also going to find out that on numerous occasions [the named victim] attacked Sergeant Mabida, and on at least one occasion placed their lives in danger."). Later in the opening, the defense repeated and expounded on its concession that the charged conduct had occurred:

> [The named victim] is going to testify that on the car ride from Mississippi to Sergeant Mabida's parent's home near Houston Texas, that Sergeant Mabida strikes her numerous times on the side of her body with his fist and with his open hand. The evidence is going to show that is true.

(R. at 336); *see also* (R. at 339) (further defense concession that the named victim had bruises from these events). Defense counsel further elaborated on the defense theory of self-defense:

> The defense is not going to look you in the eye and tell you that orange is black and black is orange, but in the words of the late great Paul Harvey, the evidence is going to tell you the rest of the story which is that Sergeant Mabida is arguing with his wife again over what he perceives to be her lies. He's unsettled in the marriage, there's no question about that, and [the named victim] likely out of frustration and just simple exhaustion from having to answer questions about what she

> did before she met Sergeant Mabida, begins to strike him while he was driving the car on the highway. What you will find out is that she reached out and grabbed the steering wheel and yanked it, and yes, he hit her. Members of the panel, it will be up to you to decide whether that was legally justified or not.

(R. at 336-37). The military judge clearly recognized that the defense opening statement had anticipated a defense of self-defense, commenting as much at a mid-trial Article 39(a) session. (R. at 383).

During trial, both parties' examinations asked YR questions about the issue of self-defense. During the government direct examination, trial counsel asked YR whether she had engaged in mutual shoving with Appellant. (R. at 367) ("Did you shove him back?"). YR did not deny it but answered ambiguously: "I do not recall shoving him back." (R. at 367). More pointedly, defense counsel questioned YR about her allegations that Appellant had hit her during the 28 December 2021 car ride. (R. at 592-93). Defense counsel asked YR a series of questions about her assaulting Appellant and engaging in dangerous behavior, all of which YR denied:

> Q. The truth, Ms. [YR], is that in that car ride you struck Sergeant Mabida first, didn't you?
>
> A. No, I did not.
>
> Q. The truth is that during that car ride, when Sergeant Mabida was on the highway, you grabbed and yanked the steering wheel, correct?
>
> A. No, I did not.

> Q. It wasn't until after you grabbed the steering wheel that Sergeant Mabida struck you.
>
> A. I didn't grab it.

(R. at 293).

After the government rested, at a preliminary Article 39(a) session discussing instructions, the military judge questioned whether the evidence had raised the affirmative defense of self-defense. (R. at 724) ("I do have a question of whether the evidence has raised the issue of self-defense in relation to these offenses so that is something we will need to discuss.").[2] At a subsequent Article 39(a) session on instructions, the military judge stated he did not think the issue of self-defense had been raised, and the defense disagreed:

> MJ: I do not see that the issue of self-defense related to Charge III has been raised by the evidence. Trial counsel, do you agree?
>
> STC: That's correct, Your Honor.
>
> MJ: Defense counsel?
>
> CivDC1: Sir, I do believe that the instruction should be given. I believe there has been an indicia of self-defense brought before the panel. Now, it was mentioned in opening -- that's not evidence and we're tracking that -- but on cross examination I did raise to the alleged victim self-defense and I think that is proper for me to be able to argue. The panel can either believe that or not,

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[2] It seems from context that the defense had already requested a self-defense instruction at this juncture. This Article 39(a) was held on 13 September 2023. (R. at 719). Per the pretrial order, proposed instructions from the parties were due on 14 April 2023. (App. Ex. 1 at 2). Appellate defense counsel do not see a copy of the defense proposed instructions included in the record.

> and argue -- essentially what I plan to do, sir, is attack the credibility of those particular answers. So, I do think based on the fact that it was raised -- she denied it. I understand that -- but I do believe that's enough for the self-defense instruction to be given to the panel.
>
> MJ: To the standard that applies there has to be some evidence. Questions are not evidence. Arguments/opening statements are not evidence. You asked two questions; I checked about this. You received a "no" to both questions and that was it. I am struggling to see where I get to this some evidence standard that I have to meet.
>
> CivDC1: The defense's argument doesn't change.

(R. at 780-81). Subsequently, defense counsel acknowledged the military judge's position and inquired if the defense could still attack the reliability of YR's denials in closing. (R. at 781). The military judge stated the defense, "of course," could attack the credibility of the trial testimony. (R. at 781). The military judge did not give a self-defense instruction. (R. at 814-18; App. Ex. XXXIV).

In closing, the defense referred back to its concessions in opening, and repeated that the defense did not contest the charged conduct in Specification 1 of Charge III. (R. at 874, 885). Defense counsel argued that the panel should not believe YR's denials of hitting Appellant first and grabbing the steering wheel while he was driving on the highway. (R. at 885). However, in the absence of a self-defense instruction, these arguments had no potency to the legal framework of the panel's deliberations.

Law

"A military judge must instruct members on any affirmative defense that is 'in issue.'" *United States v. Schumacher*, 70 M.J. 387, 389 (C.A.A.F. 2011) (citing Rule for Courts-Martial (R.C.M.) 920(e)(3)). A matter is "in issue" when *some evidence*, without regard for its source or credibility, has been admitted upon which the members might rely if they choose. *Id.* (citing *United States v. Lewis*, 65 M.J. 85, 87 (C.A.A.F. 2007) (quoting R.C.M. 920(e), Discussion) (additional citation omitted)); *see also Perez v. United States*, 297 F.2d 12, 15-16 (5th Cir. 1961) ("It is elementary law that the defendant in a criminal case is entitled to have presented instructions relating to a theory of defense for which there is *any foundation* in the evidence.") (emphasis added) (citation omitted). "In other words, a military judge must instruct on a defense when, viewing the evidence in the light most favorable to the defense, a rational member could have found in the favor of the accused in regard to that defense." *United States v. Behenna*, 71 M.J. 228, 234 (C.A.A.F. 2012) (citations omitted).

"Any doubt whether an [affirmative defense] instruction should be given should be resolved in favor of the accused." *United States v. Davis*, 53 M.J. 202, 205 (C.A.A.F. 2000) (citing *United States v. Steinruck*, 11 M.J. 322, 324 (C.M.A. 1981); *see also United States v. Ruiz*, 59 F.3d 1151, 1154 (11th Cir. 1995) (when deciding whether mistake of fact has been raised, "the court is obliged to view the

evidence in the light most favorable to the accused.") (citation omitted). Put differently, an instruction on a defense is *not* required if no reasonable panel member could find the defense applicable. *Schumacher*, 70 M.J. at 389-90 (stating that the test is similar to the test for legal sufficiency). The defense "may be raised by evidence presented by the defense, the prosecution, or the court-martial." R.C.M. 916(b), Discussion; *see also United States v. Jones*, 49 M.J. 85, 91 (C.A.A.F. 1998).

The CAAF has observed that "counsel's request for the instruction is indicative of the defense's theory of the case and can be considered by appellate courts as context for whether the entire record contains 'some evidence' that would support the instruction." *United States v. DiPaola*, 67 M.J. 98, 102 (C.A.A.F. 2008) (citation omitted).

Erroneous omission of an affirmative defense instruction is constitutional error, tested for prejudice under the harmless beyond a reasonable doubt standard. *DiPaola*, 67 M.J. at 102 ("In the context of this case, we cannot say that the absence of a mistake-of-fact instruction on this offense was harmless beyond a reasonable doubt. . . .").

It is well settled that factfinders are entitled to consider testimony they disbelieve as affirmative evidence that the opposite is true. *See Wright v. West*, 505 U.S. 277, 296 (1992); *United States v. Nicola*, 78 M.J. 223, 227–28 (C.A.A.F. 2019) ("[T]he trier of fact may disbelieve the accused's testimony and then use the

accused's statements as substantive evidence of guilt . . . ." (citation omitted)); *United States v. Mejia*, 82 F.3d 1032, 1038 (11th Cir. 1996) ("A proper inference the jury can make from disbelieved testimony is that the opposite of the testimony is true."), abrogated on other grounds by *Bloate v. United States*, 559 U.S. 196, 203 n.5 (2010); *see also United States v. Leonhardt*, 76 M.J. 821, 828–29 (A.F. Ct. Crim. App. 2017) (noting that the defense is entitled to cross-examine a witness on relevant issues even if the witness will deny the underlying facts because, *inter alia*, the members might not believe the denial).

Argument

The record contained some evidence upon which the members might rely to find self-defense, if they chose. Defense counsel asked YR if she had struck Appellant first, while he was driving. (R. at 293). Defense counsel also asked YR if she had grabbed and yanked the steering wheel while Appellant was driving on the highway – and whether he did not hit her until after she had taken this dangerous action. (R. at 293). While YR answered these questions in the negative, it is well settled that the factfinder is entitled to choose to disbelieve testimony and to consider disbelieved testimony as affirmative evidence the opposite is true. *See Wright*, 505 U.S. at 296; *Nicola*, 78 M.J. at 227-28; *Mejia*, 82 F.3d at 1038.[3] The military judge's

[3] Some evidence of self-defense was additionally raised by trial counsel's questioning about whether YR had engaged in mutual shoving with Appellant. (R.

statement that "[q]uestions are not evidence" ignored this dynamic. (R. at 780). On the facts of this case particularly, it is obvious from the verdict that the panel was *very* ready to disbelieve YR's testimony.

The CAAF has also observed that "the defense's theory of the case" is relevant for context as to whether to give an instruction. *DiPaola*, 67 M.J. at 102 (citation omitted). Here, that dynamic was on full display. The defense theory of the case, as committed to in opening, was that the conduct charged in Specification 1 of Charge III had occurred. (R. at 336-37). The defense theory as to this specification was *solely* predicated on self-defense.

Appellant was prejudiced by the lack of instruction. Indeed, it is hard to imagine more prejudice. Defense counsel had already conceded the act had occurred, relying *entirely* on self-defense as the defense theory of the case. By failing to instruct on self-defense after this concession had already been made, and after the defense had tried its case solely relying on self-defense, practically ensured a conviction. It is obvious from the verdict that the panel was extremely ready to disbelieve YR. But given the form of the instructions, there was simply no path to acquittal on Specification 1 of Charge III. This placed the defense in an impossible

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at 367). In this instance, YR did not really deny it at all, instead answering ambiguously. (R. at 367).

position and essentially made a conviction a forgone conclusion. The government cannot disprove prejudice beyond a reasonable doubt.

WHEREFORE, Appellant respectfully requests this Honorable Court set aside the findings and the sentence.

II. WHETHER RELIEF IS WARRANTED FOR PERVASIVE IMPROPER EVIDENCE AND ARGUMENT.

Standard of Review

Prosecutorial misconduct and improper argument are reviewed de novo. *United States v. Voorhees*, 79 M.J. 5, 9 (C.A.A.F. 2019) (citation omitted).

Additional Background

During the opening pages of testimony, trial counsel asked YR about personal events in Appellant's past that constituted a "traumatic experience," apparently making him particularly sensitive to issues of sexual history. (R. at 351). Defense counsel objected on the grounds that this had not been disclosed by the government as discoverable information nor noticed under Mil. R. Evid. 404(b). The military judge sustained an objection to this improper questioning and instructed the panel to disregard it. (R. at 351-52).

A few pages later, the military judge interrupted trial counsel's questioning of YR when trial counsel began to elicit evidence of uncharged conduct that had

previously been excluded. (R. at 355-56) ("Trial counsel, I'm going to ask you to be a little more directive in your questions of this witness given my prior rulings.").

Just pages later, the military judge again sustained an objection to improper character evidence or evidence of other uncharged acts. (R. at 357).

Two pages later, the government elicited evidence of an uncharged an unnoticed instance of Appellant assaulting YR by filling a mop bucket with cold water and dumping it on her. (R. at 359). The military judge sustained a defense objection to this improper evidence (R. at 363) and instructed the panel to disregard it (R. at 366).[4] Given the recuring issue, defense counsel indicated in an Article 39(a) session that the defense would seek a mistrial if the misconduct continued. (R. at 363) ("If this continues and there is additional 404(b), we will ask for a mistrial. . . .").

It did continue. Just pages later, trial counsel elicited additional testimony about uncharged shoving and the same uncharged water assault. (R. at 366-67). The defense again objected and in an Article 39(a) requested a mistrial. (R. at 367-69). The military judge sustained the objection (R. at 372), denied the request for a mistrial (R. at 372), and instructed the panel to disregard the improper evidence (R. at 376).

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[4] This seemed to relate to Specification 1 of Charge III.

Incredibly, a few pages later, trial counsel specifically and repeatedly asked the witness whether there had been uncharged hitting. (R. at 379) ("Did he also physically hit you with his hand?"; "Where did he hit you?"; "Did he hit you with an open hand or a closed fist?"; "How many times did he hit you?"). The defense again objected on Mil. R. Evid. 404(b) grounds. (R. at 379). In an Article 39(a), the military judge asked trial counsel to explain why the government was eliciting what appeared to be uncharged and unnoticed hitting. (R. at 379). Trial counsel asked for a moment, then apologized, and acknowledged it should not have been elicited. (R. at 381). Trial counsel stated that he mistakenly thought this hitting had been included in a bill of particulars. (R. at 381). The military judge responded:

> I do not think we're at the point where we're reaching manifest injustice. I think we're getting close frankly. I think what we're going to do at this point is we are going to take a break. I'll rule on the objection for sure, but we're going to take a break and I'm going to ask trial counsel to sit down with the Bill of Particulars and the charges and questions of this witness and make some determinations about what questions you need to ask this witness.

(R. at 381-82). Prior to the break, defense counsel again requested a mistrial or, if the Court declined to grant a total mistrial, dismissal of Specification 3 of Charge III. (R. at 382-87).

At a subsequent Article 39(a) session, the military judge made a lengthy oral ruling on the defense motion for a mistrial. (R. at 392-97). The ruling summarized the numerous instances up to that point where the government had elicited evidence

of uncharged and unnoticed misconduct – and the prior rulings and instructions thereon, discussed the caselaw surrounding mistrials, and issued various remedies short of a mistrial. (R. at 392-97). The defense requested reconsideration (R. at 398-99) and the military judge denied that request (R. at 399).

When the panel returned, the military judge gave another instruction to disregard various improper evidence elicited by the government. (R. at 401-02).

In a question that obviously called for improper hearsay, trial counsel later asked YR what she had told a third-party on a prior occasion. (R. at 432). The military judge sustained a defense objection to this clearly improper line of examination. (R. at 432-33). On the next page, the military judge sustained another hearsay objection involving similar evidence. (R. at 434).

Later in YR's direct examination, the military judge sustained a defense objection to Appellant dousing her with water to wake her up and instructed the members to disregard the evidence. (R. at 448). On the same page of the record, trial counsel asked YR about additional physically assaultive behavior by Appellant. (R. at 448). The defense objected based on relevance and lack of notice and the military judge sustained the objection. (R. at 449). On the very next page of the record, trial counsel began eliciting testimony about a verbal argument and Appellant's statements during said argument. (R. at 550). Defense counsel objected that Appellant's statements had not been noticed under R.C.M. 304(d) and it was the

first time the defense was hearing of this argument between YR and appellant. (R. at 451). When the members returned, the military judge instructed them to disregard the testimony. (R. at 454).

Later in YR's direct examination, trial counsel elicited testimony that Appellant had thrown a phone at her. (R. at 460). Trial counsel followed up, specifically asking: "Does he throw the phone first?" and then asking, "Did it hit you?" (R. at 461). Defense counsel objected (R. at 460) and in an Article 39(a) elaborated that Appellant throwing a phone at YR was uncharged and unnoticed misconduct (R. at 461). When asked by the military judge to explain, trial counsel responded:

> I'm sorry, Your Honor. I didn't intend to elicit that. I should have been a little more specific in my questioning. I apologize to the court.

(R. at 462).[5] The military judge stated he would sustain the objection and instruct the members accordingly. (R. at 463). Defense counsel pointed out that there had now been six or seven similar violations, and requested the military judge strike the witness' testimony. (R. at 464). The military judge denied the request to strike the witness' testimony and asked if the defense had any alternative remedy requests. (R.

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[5] Appellate defense counsel must note that trial counsel's statement that he did not intend to elicit evidence about the thrown phone is difficult to understand given that he asked two questions specifically about the thrown phone. (R. at 461) ("Does he throw the phone first?"; "Did it hit you?").

at 464). Defense counsel stated that an alternative remedy would be to dismiss (presumably via mistrial) Charge III and its specifications. (R. at 464). The military judge responded: "How about I dismiss Charge III Specification 2?" (R. at 465). Defense counsel repeated that the defense position was that a more appropriate remedy would be dismissing all of Charge III. (R. at 465). Turning to the government, the military judge asked trial counsel for the government's position on dismissing Specification 2 of Charge III. (R. at 465). Trial counsel responded:

> Your Honor, obviously the government acknowledges its mishap. In acknowledgment, if that was the court's remedy, the government would [indistinguishable.]

(R. at 465). The military judge responded:

> That is the court's remedy. I intend to declare a mistrial on Specification 2 of Charge III, and that charge will be dismissed. I'll also instruct the members consistent with my last instruction to them about any additional violation of the court's order there will be another consequence. That consequence is that charge has been dismissed.

(R. at 465). When the members returned the military judge instructed them:

> Members, you may recall earlier that I gave you an instruction that there had been presented to you some evidence that should not have been presented to you, and I instructed that the government was instructed to ensure that that did not happen again. The court has determined that that has happened again and therefore as a remedy the court is going to dismiss Specification 2 of Charge III. You'll get instructions at the end of the court on how to do this, but just know for now that that specification is no longer before you for determination.

(R. at 467).

The next morning, at an Article 39(a) before the members were called, the military judge indicated that he was aware the defense was requesting a mistrial as to all specifications of Charge III – and indicated he was inclined to revisit the issue with respect to Specification 3 of Charge III. (R. at 500). The military judge then gave a helpful recitation of all the violations of the rules of evidence, and the military judge's instructions, that had occurred the day before, concluding: "I am exercising my discretion to declare a mistrial as manifestly necessary in the interest of justice because of circumstances arising during the proceedings which cast substantial doubt on the fairness of the proceedings as to Specification 2 and Specification 3." (R. at 503-04). When the members returned, the military judge instructed them: "members, I have withdrawn from this court-martial, essentially dismissed from your consideration, Specification 3 of Charge III." (R. at 515).

A few pages into redirect, trial counsel asked YR about a prior statement to law enforcement. (R. at 611). The military judge sustained a defense objection that it was both outside the scope and also, in the military judge's words, "strictly pure hearsay". (R. at 612-15). Two pages later, the military judge sustained another defense objection on the same grounds. (R. at 617).

Trial counsel's objectionable behavior continued into closing statements. Trial counsel commented on Appellant's failure to testify, leading to a sustained objection. (R. at 841). Trial counsel later seemed to give pseudo-expert testimony

about injury causation, leading to another sustained objection. (R. at 845). Moments later, trial counsel intimated that, although the rules of evidence did not allow them to see all the evidence, law enforcement's actions in response to evidence that had not been admitted was telling, leading to another sustained objection. (R. at 846). Trial counsel then suggested that if YR had stayed with Appellant, Appellant would have abused their unborn child, leading to another sustained objection. (R. at 850-51).

After government's closing, defense counsel made multiple objections on the basis of unnoticed Mil. R. Evid. 404(b) argument, spillover argument, arguing Appellant should be convicted of Specification 1 of Charge III based on conduct not described in the bill of particulars, arguing facts not in evidence, attributing human lie detector type abilities to witnesses, and violating Mil. R. Evid. 610 by arguing the victim did not leave her husband earlier because it would be a sin according to her religion. (R. at 854-59). Taking the objections one-by-one, the military judge sustained four of them. (R. at 861-67). Turning to trial counsel, the military judge admonished:

> Trial counsel, though I have not at this moment granted as a remedy the striking of your closing argument, I do instruct you to limit your rebuttal argument only to matters that are raised by defense counsel in their closing argument. I will tell you that I will have a very, very short leash in terms of allowing you to make argument on rebuttal and will end it quickly.

(R. at 869).

The military judge commented: "I will note during trial counsel's argument I did note there were arguments and reference to evidence that I thought was beyond the scope of fair comment." (R. at 861). The military judge then proceeded to go through defense objections, sustaining some and overruling others. (R. at 862-69).

Law

"Prosecutorial misconduct can be generally defined as action or inaction by a prosecutor in violation of some legal norm or standard, e.g., a constitutional provision, a statute, a Manual rule, or an applicable professional ethics canon." *United States v. Hornback*, 73 M.J. 155, 160 (C.A.A.F. 2014) (quotations omitted). Repeated violations of the Rules for Courts–Martial and/or Military Rules of Evidence can constitute prosecutorial misconduct. *Id*. This includes asking improper questions or eliciting improper testimony. *Id.* Similarly, improper argument can constitute prosecutorial misconduct. *United States v. Norwood*, 81 M.J. 12, 19 (C.A.A.F. 2021).

In assessing prejudice, courts look "at the cumulative impact of any prosecutorial misconduct on the accused's substantial rights and the fairness and integrity of his trial." *United States v. Erickson*, 65 M.J. 221, 224 (C.A.A.F. 2007) (citing *United States v. Fletcher*, 62 M.J. 175, 184 (C.A.A.F. 2005)). This determination is based on "(1) the severity of the misconduct, (2) the measures adopted to cure the misconduct, and (3) the weight of the evidence to support the

conviction." *Norwood*, 81 M.J. at 19 (citing *Voorhees*, 79 M.J. at 12). Reversal is warranted for nonconstitutional error only when the trial counsel's comments, taken as a whole, were so damaging that the appellate court cannot be confident that the members convicted the Appellant on the basis of the evidence alone. *Sewell*, 76 M.J. at 18 (quotation omitted). In the case of constitutional error, the burden is on the Government to establish that the comments were harmless beyond a reasonable doubt. *United States v. Flores*, 69 M.J.366, 369 (C.A.A.F. 2011) (citations omitted).

Argument

The record in this case does not reflect well upon the quality of practice within the military justice system. Trial counsel elicited or attempted to elicit improper testimony on at least fourteen occasions. This conduct continued despite numerous admonitions from the military judge. The impropriety continued into closing statements where trial counsel made multiple blatantly improper arguments.[6]

Error is obvious. The question is really one of prejudice. The prejudice from the pervasive improper evidence and argument must be viewed cumulatively. *Erickson*, 65 M.J. at 224. This prejudice may also be viewed cumulatively with all

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[6] The military judge sustained defense objections to a large number of trial counsel's arguments and overruled other defense objections. (R. at 841, 845, 846, 850-51, 862-69). Given the de novo standard of review, the military judge's determination is not binding on this Court. Regardless of exactly how this Court comes down on every individual defense objection, it is abundantly clear that the volume of improper argument was substantial.

other error this Court may find, to include the failure to give the self-defense instruction. *United States v. Shelby*, 85 M.J. 292 (C.A.A.F. 2025) (discussing the cumulative error doctrine's applicability on appeal). A combined prejudice analysis is particularly relevant here. Taken together, the severity and volume of the error should lead this Court to find prejudice.

WHEREFORE, Appellant respectfully requests this Honorable Court set aside the findings and the sentence.

III. WHETHER THE MILITARY JUDGE ERRED BY ALLOWING THE GOVERNMENT TO USE LEADING QUESTIONS IN ITS DIRECT EXAMINATION OF THE NAMED VICTIM AS A "REMEDY" FOR THE GOVERNMENT'S REPEATED ELICTING OF IMRPOPER EVIDENCE.

Standard of Review

Adopted from A.E. 1.

Additional Background

As discussed above, a great deal of improper evidence was elicited during trial counsel's direct of YR, leading to a plethora of objections and Article 39(a) hearings. After several such instances, the defense moved for a mistrial. (R. at 367-69, 371). The military judge acknowledged the problem but declined to grant a mistrial. (R. at 371-72). Instead, the military judge explained that he would issue a "remedy" of allowing trial counsel to ask more leading questions of the named victim during the

government's direct examination. (R. at 371-73). Defense counsel, of course, immediately objected to this "remedy" – pointing out that it gave the government an advantage to the detriment of Appellant. (R. at 373). The military judge maintained his ruling. (R. at 374).

In accordance with the military judge's ruling, trial counsel proceeded to lead YR through much of the remainder of the direct examination, including large portions of the conduct underlying Specification 1 of Charge III. For example:

> Q. When you guys got back to the hotel room that night, did things turn physical?
>
> A. The day after we saw his parents?
>
> Q. Yes.
>
> A. Yes.
>
> Q. Did he hit you?
>
> A. Yes, he did.
>
> Q. Was he angry?
>
> A. Yes, he was.
>
> Q. What was he angry about?
>
> A. He was angry about me leaving.
>
> Q. He was angry about you leaving him to go from Biloxi back to Texas?
>
> A. Yes.

(R. at 441). As another example:

Q. Do you recall around Christmas of 2021 a discussion between you and the accused about divorce?

A. Yes.

Q. Do you remember telling him that you wanted one?

A. Yes.

Q. How did he respond?

A. He was very upset.

Q. Did he slap you in the face?

A. He did.

(R. at 449). As another example:

Q. Were you afraid that something might happen to you if you left?

A. Yes.

Q. In your divorce case is child-support set by the state?

A. I'm sorry, what?

Q. Is the amount of child-support set by the state?

A. Yes.

Q. In December 2021, you said the physical abuse was near daily.

A. Yes.

Q. Had it just become a normal part of your life at that point?

A. Yes.

(R. at 610).

Law and Argument

Appellant submits that it was error for the military judge to allow trial counsel to lead its primary witness through direct examination, particularly as a "remedy" for the government's own failures. Leading questions are, of course, usually reserved for cross-examination. Leading questions may only be used on direct under limited circumstances. *See* R.C.M. 611(c) ("Leading questions should not be used on direct examination except as necessary to develop the witness' testimony."); *see also* R.C.M. 611(c)(ii) (permitting leading questions for hostile witnesses). Appellate defense counsel believe caselaw has provided some leniency as to leading questions for child witnesses, but that is not relevant here. Appellant is aware of no caselaw that endorses the use of leading questions on direct as a prophylactic for the government's eliciting of improper evidence. If the government is aware of any precedent for such a ruling, Appellant requests it bring it to the attention of the Court. As the defense pointed out at trial, this "remedy" seems to reward the government for its errors. Simultaneously, it disadvantages the defense by making the government's job easier and depriving the panel of important information.

Prejudice is high in that this format essentially allowed trial counsel to state the substance of the testimony, and merely have a friendly witness agree with him. Prejudice may also be viewed cumulatively with other errors.

WHEREFORE, Appellant respectfully requests this Honorable Court set aside the findings and the sentence.

Conclusion

WHEREFORE, Appellant respectfully requests this Honorable Court set aside the findings of guilty and the sentence.

[redacted]

SCOTT R. HOCKENBERRY
Civilian Appellate Defense Counsel
[redacted]

(unavailable to sign due to shutdown)

LUKE D. WILSON, Lt Col, USAF
Appellate Defense Counsel
[redacted]

Certificate of Filing and Service

I certify that on 6 November 2025 the foregoing was electronically filed with the Court and was emailed to Appellate Government Division.

[redacted]
SCOTT R. HOCKENBERRY
Civilian Appellate Defense Counsel
[redacted]

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40682 (f rev)**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
John A. MABIDA	)	
Staff Sergeant (E-5)	)	
U.S. Air Force	)	
Appellant	)	**Panel 1**

On 12 August 2025, counsel for Appellant submitted a Consent Motion to Examine Sealed Materials; specifically requesting the court authorize both parties to examine Appellate Exhibits (A.E.) XIV–XVIII and XX–XXI; and transcript pages 48–75. On 15 August 2025, the court granted the motion but also noted A.E. XXI was missing from the record and ordered the Government show good cause why the court should not remand the record of trial for correction. On 26 August 2025, the Government requested the court remand the record for correction, which we did on 2 September 2025.

After the record of trial was returned to the court and the court re-docketed Appellant's case on 3 October 2025, the court continued its review. It was then discovered that A.E. XXII was not sealed when ordered to be sealed by the military judge at trial. A.E. XXII is the military judge's *Findings of Fact and Conclusions of Law & Order to Seal*, in relation to a Mil. R. Evid. 412 motion.

The court may *sua sponte* order materials sealed in accordance with Rule for Courts-Martial 1113, *Manual for Courts-Martial, United States* (2024 ed.). The Clerk of the Court will ensure A.E. XXII is properly sealed.

Accordingly, it is by the court on this 12th day of November, 2025,

ORDERED:

Appellate Exhibit XXII is hereby ordered **SEALED**.

The Government shall take all steps necessary to ensure copies of **Appellate Exhibit XXII** in the possession of any Government office, Appellant, counsel for Appellant (trial and appellate), or any other known copy, be retrieved and destroyed if a paper copy, or destroyed if an electronic copy.[*] No

[*] The base legal office may maintain a sealed copy in accordance with Department of the Air Force Manual 51-203, *Records of Trial*, ¶ 9.3.6 (21 Apr. 2021).

counsel granted access to the sealed materials may photocopy, photograph, or otherwise reproduce this material and will not disclose or make available its contents to any other individual without this court's prior written authorization.

However, if appellate defense counsel and appellate government counsel possess Appellate Exhibit XXII, now sealed, counsel are authorized to retain their copy of same in their possession until completion of this court's Article 66, UCMJ, review of Appellant's case, to include the period for reconsideration in accordance with JT. CT. CRIM. APP. R. 31. After this period, appellate defense counsel and appellate government counsel shall destroy any retained copies of the sealed materials in their possession.

FOR THE COURT

CAROL K. JOYCE
Clerk of the Court

5 December 2025

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*,	)	ANSWER TO ASSIGNMENTS OF ERROR
v.	)	
	)	ACM 40682
Staff Sergeant (E-5) JOHN ANDRE N. MABIDA, USAF *Appellant*.	)	Panel No. 1

ANSWER TO ASSIGNMENTS OF ERROR

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*, v. Staff Sergeant (E-5) JOHN ANDRE N. MABIDA, USAF *Appellant*.	)))))))))	ANSWER TO ASSIGNMENTS OF ERROR ACM 40682 Panel No. 1

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

ISSUES PRESENTED

I.

WHETHER THE MILITARY JUDGE ERRED BY DENYING APPELLANT'S REQUEST FOR A SELF-DEFENSE INSTRUCTION?

II.

WHETHER RELIEF IS WARRANTED FOR PERVASIVE IMPROPER EVIDENCE AND ARGUMENT?

III.

WHETHER THE MILITARY JUDGE ERRED BY ALLOWING THE GOVERNMENT TO USE LEADING QUESTIONS IN ITS DIRECT EXAMINATION OF THE NAMED VICTIM AS A "REMEDY" FOR THE GOVERNMENT'S REPEATED ELICTING OF IMRPOPER [SIC] EVIDENCE?

STATEMENT OF THE CASE

The United States generally accepts Appellant's Statement of the Case.

STATEMENT OF FACTS

- ***Appellant's Conviction and Bill of Particulars***

Appellant stands convicted of Charge III, Specification 1, under Article 128b, UCMJ, which read as follows:

> In that [Appellant], . . . did, within the continental United States, on divers occasions, between on or about 21 October 2021 and on or about 2 January 2022, commit a violent offense against [YR], the spouse of [Appellant], to wit, assault consummated by a battery, by unlawfully striking her body with his hand.

(Charge Sheet.)[1]

Prior to trial, the Government responded to a defense Bill of Particulars regarding Charge III, Specification 1. The defense asked, "[W]hat specific acts of alleged battery does this charge cover? When did these acts occur and where did they occur? What is the date that this occurred? How many times did [Appellant] strike [YR]? Please state whether any of these acts overlap with the acts as described in Charge III, Specifications 4 and 8?" (App. Ex. XXII at 19.) The Government responded as follows:

> Charge III, Specification I pertains to the following events. First, on or about 11 November 2021, [Appellant] struck [YR's] left thigh with his right hand while in his car at or near the Tienda Santa Fe in Biloxi, MS. Second. on or about 28 December 2021, [Appellant] struck [YR] while driving from Biloxi, MS to Cypress, TX. [Appellant] struck [YR's] left arm, left thigh, and face with this right hand. [Appellant] switched his ring to his right hand to inflict more pain to [YR]. Finally, the Government anticipates [YR] will testify that [Appellant] struck her repeatedly on various parts of her body

[1] The Charge Sheet refers to YR as YM. At trial, YR stated that she changed her name to YM after marrying Appellant and took his last name. (R. at 355.) However, by the time of trial, YR was referred to by her maiden last name. (R. at 342.) YR is also how Appellant' refers to her throughout his brief. (App. Br. at 2.)

> throughout December 2021. *See* AFOSI Victim Interview at 1:48:00. None of the above overlaps with Specifications 4 and 8.

(Id.)

- ***YR's Testimony***

YR testified that she met Appellant on the internet in early June 2021. (R. at 343.) The couple married on 1 October 2021. (R. at 349.)

On 11 November 2021, YR testified that Appellant became physical with her in a car outside of a Mexican restaurant. YR said, "[Appellant] was upset about the past. He wanted me to be very detailed in talking about the events in the past, and I could not remember. That made him more upset and it escalated to hitting." (R. at 414.) YR said the hitting was mostly on the left side of her body and that the hitting caused bruising. (Id.)

YR also recounted multiple instances in December 2021 when Appellant would become physical. (R. at 444-45.) YR said Appellant would slap her on the face with his hand, which would either cause her to lose her balance or fall on the floor. (R. at 445, 449, 581.) YR said the physical abuse became a daily thing and agreed that it had become a normal part of her life. (R. at 610.) YR said she "felt really broken." (Id.)

YR then testified regarding a trip the couple took from Biloxi, Mississippi to Cyprus, Texas on 28 December 2021. (R. at 454.) YR said they were traveling to see Appellant's parents and that the drive lasted eight to nine hours. YR testified that Appellant was angry with her the entire ride. YR said that Appellant punched her in the thigh at least 50 times with his fist while he was driving and also punched her a few times in her face and arm. (R. at 455-56.)

YR said during the trip the couple stopped at an HEB grocery store because Appellant wanted to buy makeup to cover up the bruises on YR's face. (R. at 457.) YR said she had

bruising on her face, arm and leg. When asked if it hurt, YR said, "Very much. I was screaming and crying most of the time." (Id.)

Referencing the first photo of Prosecution Exhibit 2, YR said the photo showed a bruise on her left thigh that resulted from Appellant hitting her during the 28 December car ride. (R. at 490-91; Pros. Ex. 2.) The second and last photos of Prosecution Exhibit 2 showed YR's bruised left eye and left arm, which YR said was also the result of Appellant hitting her during the 28 December car ride. (R. at 491-92.)

On cross-examination, Appellant's trial defense counsel asked about the 28 December 2021 incident in the following exchange:

> DC: You and [Appellant] drove from Biloxi, Mississippi to Houston, Texas; am I right about that?
>
> YR: Yes.
>
> DC: And that was to visit [Appellant's] family.
>
> YR: Yes.
>
> DC: This was on 28 December 2021?
>
> YR: Yes.
>
> DC: And you testified that it was during this trip that [Appellant] hit you over 50 times. You testified that this is where he struck your leg over and over again, is that right?
>
> YR: Yes.
>
> DC: And this is where the bruises that we saw in court yesterday came from; am I right about that?
>
> YR: Yes.
>
> . . .

DC: During the car ride, you and [Appellant] had an argument, am I right about that?

YR: Yes.

DC: An argument over your sexual past.

YR: Yes.

DC: You were sick and tired of having to answer his questions.

YR: Yes.

DC: You must have been sick and tired of having to explain yourself.

YR: Yes.

DC: The truth, [YR], is that in that car ride you struck [Appellant] first, didn't you?

YR: No, I did not.

DC: The truth is that during that car ride, when [Appellant] was on the highway, you grabbed and yanked the steering wheel, correct?

YR: No, I did not.

DC: It wasn't until after you grabbed the steering wheel that [Appellant] struck you.

YR: I didn't grab it.

(R at 592-93.)

- ***Instructions***

Prior to the close of evidence, the military judge had a brief discussion with counsel about his current draft findings instructions. With regard to Charge III, the military judge said, "I do have a question of whether the evidence has raised the issue of self-defense in relation to these offenses so that is something we will need to discuss." (R. at 724.)

The following day at the close of evidence, the parties had the following discussion involving the self-defense instruction:

> MJ: I do not see that the issue of self-defense related to Charge III has been raised by the evidence. Trial counsel, do you agree?
>
> STC: That's correct, Your Honor.
>
> MJ: Defense counsel?
>
> DC: Sir, I do believe that the instruction should be given. I believe there has been an indicia of self-defense brought before the panel. Now, it was mentioned in opening -- that's not evidence and we're tracking that -- but on cross-examination I did raise to the alleged victim self-defense and I think that is proper for me to be able to argue. The panel can either believe that or not, and argue -- essentially what I plan to do, sir, is attack the credibility of those particular answers. So, I do think based on the fact that it was raised -- she denied it. I understand that -- but I do believe that's enough for the self-defense instruction to be given to the panel.
>
> MJ: To the standard that applies there has to be some evidence. Questions are not evidence. Arguments/opening statements are not evidence. You asked two questions; I checked about this. You received a "no" to both questions and that was it. I am struggling to see where I get to this some evidence standard that I have to meet.
>
> DC: The defense's argument doesn't change. I certainly understand the court's position. I do expect to attack on close the reliability of those particular answers, understanding that I will stay away from the specific mention of reasonableness and honesty, sir, that goes with that definition, but I do at least want to attack that they can believe that or not.
>
> MJ: Of course.
>
> DC: Yes, sir.
>
> MJ: I think I understood that. I want to be careful on agreeing to something, but of course you can attack her credibility on any of the testimony that she has given in court. That's what you're saying, right?

> DC: Yes, sir. Yes, sir; especially in light of the fact that the court does not think there has been enough raised to give the instruction.

(R. at 780-81.)

- ***Defense's Opening Statement***

During the defense's opening statement, Appellant's civilian defense counsel stated the following:

> No member of the defense team is going to stand here and look you in the eye and tell you that [Appellant] never laid hands on his wife. He did. But you're also going to find out that on numerous occasions [YR] attacked [Appellant], and on at least one occasion placed their lives in danger.

(R. at 328.)

Appellant's counsel also stated the following:

> Ladies and gentlemen, that takes us now to essentially the month of December -- really, from the end of November to 16 December. The defense anticipates that [YR] is going to testify that during this month there was hardly a single day where she was not beaten. You're going to get to go back in time. The defense anticipates you're going to see the text messages between [Appellant] and [YR] doing this timeframe of the actual communications between the two. Now there's not a ton because it's COVID. Those messages will show you the true nature of their relationship. The evidence will show in those messages this is not a case about terror or fear.
>
> These two individuals were sharing loving and kind messages between them; that they had an active and a healthy sexual lifestyle together. The defense also anticipates you will see several photographs from the December 2021 timeframe taken throughout the course of the month.
>
> . . .
>
> The evidence is going to show that despite the allegations made by [YR], you will see her face yourself. You will see the text messages and you will see the photos following the actual time she alleges these things happened. You will also find out that during the entire

> month of December they have an active, consensual sexual relationship together.

(R. at 335-36.)

As to 28 December 2021, Appellant's counsel stated the following:

> That takes us now to 28 December 2021, and I promise I am getting closer to the end. [YR] is going to testify that on the car ride from Mississippi to [Appellant's] parent's home near Houston Texas, that [Appellant] strikes her numerous times on the side of her body with his fist and with his open hand. The evidence is going to show that is true. The defense is not going to look you in the eye and tell you that orange is black and black is orange, but in the words of the late great Paul Harvey, the evidence is going to tell you the rest of the story which is that [Appellant] is arguing with his wife again over what he perceives to be her lies. He's unsettled in the marriage, there's no question about that, and [YR] likely out of frustration and just simple exhaustion from having to answer questions about what she did before she met [Appellant], begins to strike him while he was driving the car on the highway. What you will find out is that she reached out and grabbed the steering wheel and yanked it, and yes, he hit her. Members of the panel, it will be up to you to decide whether that was legally justified or not.

(R. at 336-37.)

- ***Defense's Closing Argument***

During the defense's closing argument, Appellant's trial defense counsel stated, "I also told you no member of the defense team would look you in the eye and tell you that [Appellant] never laid hands on [YR]. He did. I told you you'd see photographs of injuries." (R. at 874.) Later, the defense counsel argued as follows:

> Let us start with Charge III Specification 1. This is the alleged hitting from inside the car. These are the photographs of the bruises that trial counsel has shown time and time again. Ladies and gentlemen, defense's position is clear. Those are real bruises caused by [Appellant's] hand. We've never hid from that; we've never run from it. The fact of the matter is I asked [YR] on the stand if she reached out and grabbed the steering wheel and she said no. They were driving on the highway at a fast rate of speed. I asked [YR] if

> she had hit him first while he was driving on the highway and she said no. It's up to you as the panel to decide whether or not that's credible.

(R. at 885.) Appellant's counsel then argued that YR was not a credible witness. However, during this portion of argument discussing Charge III, Specification 1, Appellant's counsel did not specifically reference or discuss YR's testimony regarding the 11 November 2021 incident at the Mexican restaurant or her testimony of being continually physically assaulted throughout the month of December 2021. (See R. at 885-887.)

Additional facts necessary to the disposition of this case are discussed in the specific issues below.

ARGUMENT

I.

THE MILITARY JUDGE DID NOT ERR IN DENYING APPELLANT'S REQUEST FOR A SELF-DEFENSE INSTRUCTION.

Standard of Review

Allegations of error involving mandatory instructions are reviewed de novo. United States v. Bean, 62 M.J. 264, 266 (C.A.A.F. 2005) (citations omitted). Due to the constitutional dimensions, if instructional error is found, it must be tested for prejudice under a harmless beyond a reasonable doubt standard. United States v. Dearing, 63 M.J. 478 (C.A.A.F. 2006) (quoting United States v. Wolford, 62 M.J. 418, 420 (C.A.A.F. 2006)).

Law

The self-defense instruction constitutes a mandatory instruction, which the military judge is obligated to give if reasonably raised as an issue, since it is a special defense identified in R.C.M. 916. Dearing, 63 M.J. at 482. A defense is reasonably raised when there is "some

evidence upon which members could reasonably rely to find that each element of the defense has been established." United States v. Stanley, 71 M.J. 60, 62 (C.A.A.F. 2012) (quoting United States v. Schumacher, 70 M.J. 387, 389-90 (C.A.A.F. 2011).

"In other words, 'some evidence,' entitling an accused to an instruction, has not been presented until 'there exists evidence sufficient for a reasonable jury to find in [the accused's] favor.'" United States v. Schumacher, 70 M.J. at 389 (citing Mathews v. United States, 485 U.S. 58, 63 (1988); Stevenson v. United States, 162 U.S. 313 (1896)). "Thus, the military judge must answer the legal question of whether there is some evidence upon which members could reasonably rely to find that *each element of the defense* has been established." Schumacher, 70 M.J. At 389. (emphasis added).

Since Appellant was charged with assault consummated by battery, to claim self-defense, the evidence had to show that Appellant:

> (A) Apprehended, upon reasonable grounds, that bodily harm was about to be inflicted wrongfully on the accused; and
>
> (B) Believed that the force that accused used was necessary for protection against bodily harm, provided that the force used by the accused was less than force reasonably likely to produce death or grievous bodily harm.

R.C.M. 916(e)(3).

"The first element . . . has an objective component, involving the perception of a reasonable person under the circumstances." United States v. Dobson, 63 M.J. 1, 11 (C.A.A.F. 2006). However, "[t]he second element . . . is wholly subjective, involving the personal belief of the accused, even if not objectively reasonable." Id.

The right to self-defense is lost if an appellant was an aggressor, engaged in mutual combat, or provoked the attack that gave rise to the apprehension, unless Appellant had

withdrawn in good faith after the aggression, combat, or provocation and before the offense alleged occurred. R.C.M. 916(e)(4).

Analysis

As detailed above and as argued by the trial counsel in his closing argument,[2] the Government provided evidence of two specifics instances (the Mexican restaurant parking lot and the drive from Mississippi to Texas) and a general timeframe (the month of December) to prove that Appellant assaulted YR on divers occasions by unlawfully striking her body with his hand. The military judge did not err in denying Appellant's request to give the self-defense instruction to the members because there was no evidence upon which the members could reasonably rely to find that each element of self-defense had been established relating to these three timeframes of assault. Specifically, there was no evidence to show that a reasonable person would think that bodily harm was about to be inflicted on Appellant during any of these instances. Furthermore, considering there was no evidence of Appellant's subjective beliefs in the record at all, there was no evidence that Appellant believed that the force he used against YR was necessary for his protection during any of these instances.

Appellant claims otherwise. To start, Appellant claims the Government brought upon the issue of self-defense by claiming the "trial counsel asked YR whether she had engaged in *mutual shoving* with Appellant." (App. Br. at 5, citing R. at 367; *see also* App. Br. at 10-11.) (emphasis added.) Appellant's characterization of the trial counsel's question is incorrect because the trial counsel never asked about a supposed "mutual shoving." During direct examination, the trial counsel directed YR to the 21 October 2021 and 14 November 2021

[2] *See* R. at 829. 844, 846.

timeframe and asked if there was an argument about her past sexual history. (R. at 359.) YR recounted an argument that occurred in the master bedroom of their Biloxi, Mississippi home. (Id.) YR said Appellant was "intimidating," "really angry," and eventually became physical with her. (R. at 366.) When asked if Appellant was physical with her, YR said, "There was shoving, pushing." (Id.) The trial counsel then asked, "Did you shove him *back*?" (R. at 367.) (emphasis added.) YR responded, "I do not recall shoving him *back*." (Id.) (emphasis added.)

The context of this interaction – and especially the use of the word "back" – shows the trial counsel was asking whether YR did anything *in response* to Appellant's shove. There is no indication that "mutual shoving" occurred and the record plainly shows the trial counsel did not ask YR if she engaged in "mutual shoving." This testimony shows Appellant was the aggressor in this instance and there was no evidence that YR engaged in physical aggression against Appellant prior to him shoving her. Moreover, even if there was "mutual shoving," R.C.M. 916(e)(4) states that the "right to self-defense is lost if an appellant was . . . engaged in mutual combat." Thus, even if "mutual shoving" did occur, there would still be no self-defense in that instance.

Yet, as shown, there was never a question about "mutual shoving," but instead a question of whether YR had shoved Appellant "back" after he initiated physical violence against her. Moreover, this specific instance is not one of the instances detailed by the Government in its Bill of Particulars response for Specification 1 of Charge III and was not used as evidence to support that particular specification. Thus, Appellant's claim is not only unsupported by the facts, but is also irrelevant to the specification for which Appellant's stands convicted.

That aside, reviewing the Government's evidence of Appellant's repeated assaults on YR specific to Specification 1 of Charge III, the first specific instance occurred on 11 November

2021 in the parking lot of a Mexican restaurant. YR testified that Appellant that night was upset about her past, she could not remember details of her sexual past that he wanted her to give, and "it escalated to hitting." (R. at 414.) There is no evidence in the record that self-defense applied in this instance. Importantly, Appellant does not discuss this specific instance in his brief at all, and certainly does not allege that self-defense somehow applied in this instance. Appellant's trial defense counsel also never addressed this instance in either his opening statement or closing argument.

Next, YR testified about multiple instances throughout the month of December 2021 were Appellant slapped her and was physically abusive. (R. at 445, 449, 581, 610.) Again, there is no evidence in the record that self-defense applied to this instance. And again, Appellant fails to discuss these instances in his brief at all, let alone allege that self-defense applied to any of these instances of physical abuse. In contrast to the first instance above, Appellant's trial defense counsel did speak about these assaults in his opening statement. (*See* R. at 335-36.) However, those statements focused on whether these assaults occurred at all by (1) stating text messages during this time would show "two individuals were sharing loving and kind messages" and "that they had an active and a healthy sexual lifestyle together;" and (2) saying the evidence would "show that despite the allegations made by [YR], you will see her face." (Id.) Thus, not even the theory of self-defense, let alone any actual evidence of self-defense, was ever raised by the defense for this instance.

The final evidence proving this charge was YR's testimony about the events on 28 December 2021. YR testified that Appellant was angry with her for their entire drive from Mississippi to Texas and that he punched her at least 50 times to various parts of her body. (R. at 455-56.) In fact, Appellant punched her so much that he had to stop at a grocery store and buy

makeup to cover the bruising he caused on YR. (R. at 457.) The pictures at Prosecution Exhibit 2 highlight the injuries he caused to YR as a result of his repeated violence. Moreover, YR flatly denied Appellant's counsel's cross-examination questions alleging that she struck Appellant first and grabbed at the steering wheel of the car.

Here again, there was no evidence that self-defense applied in this instance as there is no evidence to show that a reasonable person would think that bodily harm was about to be inflicted on Appellant. Furthermore, considering the lack of evidence of Appellant's subjective beliefs in the record at all, there was no evidence that Appellant believed that the force he used against YR was necessary for his protection.

Appellant believes otherwise, however, because his counsel (1) intimated a self-defense defense during his opening statement, and (2) asked YR two leading questions. (App. Br. at 4-6, 10-11.) Appellant is mistaken.

As the military judge correctly stated at trial, neither questions nor opening statements nor arguments are evidence. (R. at 780.) Both this and other service Courts have repeatedly held as such. *See* United States v. Faile, ACM S32098, 2013 CCA LEXIS 961, *16 (A.F. Ct. Crim. App. 2013) (unadopted questions by counsel are not evidence); United States v. Watson, 14 M.J. 593, 594 (A.F.C.M.R. 1982) (assertions by counsel do not qualify as evidence); United States v. Diggs, NMCCA 200800633, 2009 CCA LEXIS 100 (N-M Ct. Crim. App. Mar. 24, 2009) ("we acknowledge that questions and assertions by counsel are not evidence"); United States v. White, 33 M.J. 555, 558 (A.C.M.R. 1991) (quoting Saltzburg, Schinasi & Schlueter, Military Rules of Evidence Manual (2d ed. 1986) 382 ("[I]nformation contained in the questions is not evidence.")); United States v. Hubert, 6 M.J. 887, 890 (A.C.M.R. 1979) ("questions of counsel are not evidence").

Appellant's counters, however, by claiming that it is "well settled that factfinders are entitled to consider testimony they disbelieve as affirmative evidence that the opposite is true." (App. Br. at 9, citing Wright v. West, 505 U.S. 277, 296 (1992); United States v. Nicola, 78 M.J. 223, 227–28 (C.A.A.F. 2019); United States v. Mejia, 82 F.3d 1032, 1038 (11th Cir. 1996); United States v. Leonhardt, 76 M.J. 821, 828–29 (A.F. Ct. Crim. App. 2017). Appellant's assertion is incorrect as it relates to this case.

First, Wright, Nicola, and Mejia, dealt with criminal defendants who testified on their own behalf. As our superior Court found in Nicola, the Supreme Court in Wright "concluded that a jury was 'entitled to discount [the defendant's] credibility on account of his prior felony conviction' and was 'further entitled to consider whatever it concluded to be perjured testimony as affirmative evidence of guilt.'" Nicola, 78 M.J. at 228 (citing Wright, 505 U.S. at 296). While Appellant is correct that Meija states, "A proper inference the jury can make from disbelieved testimony is that the opposite of the testimony is true," he omits the accompanying citation to United States v. Brown, 53 F.3d 312, 314-15 (11th Cir. 1995). (*See* App. Br. at 10.) The full quote from Brown reads, "To be more specific, we have said that, *when a defendant chooses to testify*, he runs the risk that if disbelieved 'the jury might conclude the opposite of his testimony is true.'" Brown, 53 F.3d at 314 (emphasis added) (quoting Atkins v. Singletary, 965 F.2d 952, 961 n.7 (11th Cir. 1992) (Atkins also involved a criminal defendant testifying)).

Moreover, those cases involved appellant's providing substantive and descriptive testimony of their version of events. For instance, in Nicola, the appellant testified that his victim disrobed herself. Nicola, 78 M.J. at 228. In Wright, the appellant, charged with stealing items, testified that he frequently bought and sold items and denied stealing any items. Wright, 505 U.S. at 295. None of the defendant testimony in these cases involved simple "yes" or "no"

answers, but instead involved an appellant providing a full and descriptive rendition of their version of events. In Mejia, the appellant "took the stand in his own defense and offered innocent explanations for his conduct: he said he thought he was participating in a transaction to purchase a trailer, not a transaction to purchase cocaine." Mejia, 82 F.3d at 1038.

Here, as opposed to those cases, YR was not a criminal defendant. Moreover, as opposed to those cases, the testimony at issue were two "no" answers to leading questions, not substantive testimony. Appellant has failed to cite to any case, let alone show "well settled" law, that a witness simply answering "No" to a leading question by a defense counsel can be used by a panel as substantive evidence that the opposite is true.

In contrast, as shown above, this Court in Faile held that an "unadopted question" was not evidence at all. In that case, there was a dispute as to what date a party had been held. The trial counsel's questioning to a witness indicated a belief by the trial counsel that the witness had previously indicated the party was held on a different date than what the witness had testified to at trial. However, the witness denied this, and no other witness testified that the witness had made a prior statement indicating a different date than what she had testified to at trial. This Court held that a prior inconsistent statement instruction should not have been given in the case because there was no evidence that the witness made a prior inconsistent. Citing Watson and United States v. Barbeau, 9 M.J. 569 (A.F.C.M.R. 1980), the Court held, "The unadopted question by trial counsel is not evidence." Faile, at *16.

Appellant cites to Leonhardt, which does not involve an accused testifying. (*See* App. Br. at 9.) However, that case focused on members' ability to use a witness's testimony during cross-examination as a basis to judge credibility. As this Court stated, "The Government notes that [the witness] would presumably have denied the proffered post-offense consensual sexual

encounters if she had been cross-examined about them. However, it is possible the members might not have believed her, or might have harbored greater doubts about her testimony and credibility more generally." Leonhardt, 76 M.J. at 828-829. Consistent with this approach, the military judge in this case readily acknowledged and told Appellant's counsel that he could argue to the members about YR's credibility.

However, contrary to Appellant's implication in his brief, this Court in Leonhardt never stated that a witness's denials – especially in this case which involved YR simply saying "no" to leading questions – could be used as substantive evidence that the opposite of the testimony was true. Again, there was never any substantive evidence of self-defense in this case.

Finally, citing United States v. DiPaola, 67 M.J. 98 (C.A.A.F. 2008), Appellant claims that the defense's theory of the case is "relevant for context as to whether to give an instruction." (App. Br. at 11, citing DiPaola, 67 M.J. at 102.) Appellant states that "CAAF has observed that 'counsel's request for the instruction is indicative of the defense's theory of the case and can be considered by appellate courts as context for whether the entire record contains 'some evidence' that would support the instruction.'" (App. Br. at 11, quoting DiPaola, 67 M.J. at 102.)

In doing so, Appellant's brief notably omits the accompanying citation to this DiPaola quote, which is a detriment to his claim. There, citing to United States v. Hibbard, 58 M.J. 71, 72 (C.A.A.F. 2003), CAAF highlighted that Hibbard "stat[ed] that the defense theory at trial is a non-dispositive factor." DiPaola, 67 M.J. at 102.

Thus, Appellant's claim relies on a non-dispositive factor, which weighs against him. Adding further issues to his claim is that the fact that the defense's theory is merely "context" – not actual evidence. Indeed, while Appellant is correct that the defense's theory can be

considered as context when determining whether the record contains "some evidence" to support an instruction, that context does not and cannot create evidence that does not exist.

Here, the only supposed evidence of self-defense cited by Appellant in his brief to support his cause are YR's two "no" answers – answers which have repeatedly been held to *not* be substantive evidence. Thus, while a defense theory can be used as "context," that "context" is irrelevant when, as in this case, there is zero evidentiary support in the record to support the theory. In sum, a defense theory alone – without any actual evidence to back it up – is insufficient to warrant an instruction.

Finally, even if the military judge should have given the instruction, there was no prejudice because the evidence overwhelmingly showed self-defense was not a justifiable or reasonable defense in this case. As detailed above, there was no evidence that self-defense applied in the incident in the Mexican restaurant parking lot. There was no evidence that YR was about to inflict bodily harm on Appellant and no indication that Appellant himself believed he needed to use force against YR to defend himself. Instead, all evidence points to Appellant being the sole aggressor and "escalat[ing]" the situation to hitting. (R. at 414.) Thus, pursuant to R.C.M. 916(e)(3) and 916(e)(4), Appellant had no right to self-defense.

The same goes for the multiple instances through December 2021 when Appellant repeatedly slapped and abused YR. Again, this was no evidence in the record that self-defense applied during this timeframe since the evidence again shows Appellant was always the aggressor. Again, there is no evidence that YR was about to inflict bodily harm on Appellant on these occasions, and no indication that Appellant himself believed he needed to use force against YR to defend himself. Here again, pursuant to R.C.M. 916(e)(3) and (e)(4), Appellant had no

right to self-defense. Further, the defense's theory for these instances was that they did not happen at all – not that Appellant was somehow defending himself from YR.

As to the 28 December 2021 incident in the car, the actual evidence in this case – i.e., YR's testimony that Appellant was angry with her and then began repeatedly hitting her – shows that Appellant was again the initial aggressor, which again lost him any right to self-defense pursuant to R.C.M. 916(e)(4). Appellant's only attempt to contradict this evidence was his counsel's leading questions to YR about her supposedly hitting him first or her grabbing at the steering wheel – both of which YR flatly denied by answering "no." Yet, even if Appellant's unsupported theory that YR was the initial aggressor was believed, Appellant still lost his right to self-defense based on his subsequent actions and the injuries he inflicted on YR. Here, Appellant claims he was simply defending himself when YR supposedly tried to grab the steering wheel of the car and supposedly struck him first.

Yet, even if that were true, Appellant would still have to show that his reaction to YR's alleged acts were objectively reasonable considering the circumstances and that Appellant himself subjectively believed that that the force he used against YR was necessary for his protection. The record lacked evidence of both.

First, there is no evidence of Appellant's subjective beliefs in the record. As to the objective standard, a reasonable person in this hypothetical situation (wife hitting him and grabbing at the steering wheel) would have pulled over, stopped the car, and distanced himself from his wife. But that is not what happened here. Instead, photographic evidence, as well as YR's testimony, shows that Appellant repeatedly hit YR during this incident, causing numerous bruises on YR on various parts of her body. (R. at 455-56, Pros. Ex. 2.) Appellant's own defense counsel conceded as much by admitting that YR would testify that Appellant hit her

"numerous times on the side of her body with his fist and with his open hand" and that the "evidence is going to show that is true." (R. at 336.) Moreover, Appellant punched YR so much that he had to stop at a grocery store and buy makeup to cover the bruising he caused on her. (R. at 457.) Thus, even if Appellant's theory of supposed wheel grabbing and YR initiating the punching were true, Appellant's response was not objectively reasonable, thus killing any self-defense argument.

Moreover, considering the injuries he inflicted on YR, Appellant further lost the right to self-defense via R.C.M. 916(e)(4) by (1) engaging in mutual combat when he repeated hit and bruised YR; and (2) by provoking any supposed attack by YR based on his actions in the car prior to any assaults occurring. In short, even if a self-defense instruction had been given, the evidence – including photographs of bruising inflicting on YR by Appellant – show that Appellant was neither objectively or subjectively engaging in self-defense when he repeatedly hit his wife across various parts of her body.

In sum, Appellant has failed to show the military judge erred in denying the self-defense instruction. The record in this case has *no* evidence upon which the members could reasonably rely on to find that each element of self-defense had been established. Further, there was no prejudice even if the instruction should have been given. Appellant failed to discuss the Mexican restaurant incident and the repeated incidents during December in his brief and never intimated self-defense regarding those incidents at trial. In fact, Appellant argued the December incidents never even happened. As to the driving incident, even if Appellant's unsupported-by-evidence theory that YR initiated the hitting and grabbed at the steering wheel were true, Appellant's reaction to YR, as evidence by photographic evidence, was neither objectively reasonable or based on a subjective belief that such a level of retaliatory force was needed. Further, Appellant

lost any right to self-defense in this instance by engaging in – at best – mutual combat and provoking the altercation in the first place. Simply put, there was no error by the military judge and no prejudice to Appellant. As a result, this Court should find no error and affirm Appellant's conviction.

II.

APPELLANT HAS NOT DEMONSTRATED RELIEF IS WARRANTED DUE TO ALLEGED IMPROPER EVIDENCE AND ARGUMENT BY TRIAL COUNSEL.

Standard of Review and Law

This Court reviews prosecutorial misconduct and improper argument de novo. United States v. Voorhees, 79 M.J. 5, 9 (C.A.A.F. 2019). If proper objection is made, this Court reviews for prejudicial error. United States v. Andrews, 77 M.J. 393, 398 (C.A.A.F. 2018). If this Court finds error, this Court then then determines "whether there was a reasonable probability that, but for the error, the outcome of the proceeding would have been different." Voorhees, 79 M.J. at 9. In analyzing prejudice, this Court considers: "(1) the severity of the misconduct, (2) the measures adopted to cure the misconduct, and (3) the weight of the evidence supporting the conviction." Andrews, 77 M.J. at 402 (quoting United States v. Fletcher, 62 M.J. 175, 184 (C.A.A.F. 2005)).

Analysis

Appellant has failed to show prejudicial error in this case that warrants relief. Here, even assuming the trial counsel erred in statements or arguments made during Appellant's trial, Appellant cannot demonstrate prejudice considering (1) the military judge timely instructed the members to disregard any alleged improper evidence; (2) the military judge took a drastic remedy and declared a mistrial on two specifications; (3) the members acquitted Appellant of all

but one specification in this case; and (4) the specification of which Appellant was convicted is backed by overwhelming evidence – including admissions by Appellant's counsel both at trial and before this Court that Appellant struck YR.

Notably, while Appellant cites the Fletcher factors once in his brief, Appellant makes no attempt to discuss them individually or explain specifically why or how he was prejudiced by the alleged errors cited in his brief. (*See* App. Br. at 20-22.) Appellant fails to address the fact that the members acquitted him of seven out of eight specifications. He fails to explain why those numerous acquittals should not be viewed as highly persuasive evidence that the members' decision was not impacted by any supposed errors by the trial counsel. He also fails to discuss the weight of the evidence supporting his sole conviction – evidence which his own counsel at trial said was true. Instead, Appellant takes a more general approach and, without discussing anything specific, broadly claims prejudice based on "cumulative error." As shown, Appellant's prejudice argument is lacking and should be dismissed by this Court.

- ***Uncharged Misconduct***

Most of Appellant's complaints at trial and before this Court revolve around unnoticed or uncharged evidence via Mil. R. Evid. 404(b) or unnoticed statements via R.C.M. 304(d). Of the "fourteen occasions" in which Appellant claims the "[t]rial counsel elicited or attempted to elicit improper testimony,[3] nine of those occasions involved lack of notice or uncharged misconduct issues. (*See* R. at 351-52, 357, 359, 366-67, 379, 448, 449, 451, 461.)

[3] *See* App. Br. at 21.

However, as Appellant acknowledges,[4] the military judge handled each of those instances immediately by sustaining Appellant's objection and, in eight of the instances, specifically instructed the panel to disregard the testimony. (*See* R. at 352, 357, 363, 366, 372, 376, 401-02, 448, 449, 454, 463.) Court members are presumed to follow the military judge's instructions absent evidence to the contrary. United States v. Taylor, 53 M.J. 195, 198 (C.A.A.F. 2000).

The military judge took even further drastic action by declaring a mistrial as to two of the specifications. (R. at 465, 503-04.) Here, the military judge's curative actions more than accounted for any presumed error by the trial counsel.

The member's findings further show they were not impacted by any alleged error by the trial counsel as they acquitted Appellant of seven specifications and convicted him of just one.

Moreover, the one convicted specification was supported by overwhelming evidence, including YR's testimony as well as the photographs in Prosecution Exhibit 2. The evidence specifically regarding Appellant striking YR during the car ride to Texas was so overwhelming, in fact, that Appellant own counsel admitted to the members that YR would testify that Appellant hit her "numerous times on the side of her body with his fist and with his open hand" and that the "evidence is going to show that is true." (R. at 336.)

These factors – the military judge's curative measures, the member's acquitting Appellant of seven out of eight specifications, and the overwhelming evidence of guilt as to his sole conviction – weigh heavily in the Government's favor to show Appellant was not prejudice by any presumed error by the trial counsel.

[4] *See* App. Br. at 12-19.

- ***Improper Hearsay***

The remainder of Appellant's complaints about improper evidence revolve around improper hearsay objections. (*See* R. at 432, 434, 611-615, 617-18.) However, in each of these four instances, the military judge sustained Appellant's objections before YR could respond to the trial counsel's question. (R. at 432, 434, 615, 618.) Thus, the members never heard any actual improper hearsay evidence. For this reason, as well as the reasons listed above, Appellant has failed to show any prejudice as a result of these four sustained questions by the trial counsel.

- ***Closing Argument***

Finally, Appellant complains about various portions of the trial counsel's closing argument. Importantly, the military judge sustained each of the objections highlighted in Appellant's brief. (*See* App. Br. at 18-19.) Appellant fails to mention, however, the military judge went further and issued a lengthy curative instruction following the trial counsel's argument. (R. at 871-73.)

Just as he did with his testimony complaints above, Appellant fails to detail how the trial counsel's closing argument prejudiced him, especially considering the panel acquitted him of seven of the eight specifications he faced – a fact that, like the military judge's curative instruction, is absent from his brief. Here again, the military judge's curative instructions, the members' findings, and the overwhelming evidence of his guilt to his sole conviction show Appellant was not prejudiced by any alleged error by the trial counsel in his closing argument.

Overall, even if this Court assumes error, Appellant's justification that he was actually prejudiced is lacking. While Appellant asks this Court to "cumulatively" view any error on the part of the trial counsel, he fails to discuss any of the Fletcher factors individually. He fails to explain why the military judge's curative actions – including instructing the members to

disregard evidence and declaring a mistrial on two specifications – did not cure any errors, especially when the members' final verdict acquitted Appellant of seven of eight specifications. He also fails to address the great weight of the evidence against him regarding his sole conviction – a specification in which his own counsel admitted the evidence regarding Appellant repeatedly hitting YR was true. For these reasons, Appellant fails to show prejudice.

Accordingly, even if the trial counsel did commit error, Appellant has suffered no prejudice. Therefore, this claim must fail.

III.

THE MILITARY JUDGE DID NOT ABUSE HIS DISCRETION UNDER MIL. R. EVID. 611 DURING YR'S TESTIMONY.

Standard of Review and Law

This Court reviews a military judge's control of the mode of witness interrogation pursuant to Mil. R. Evid. 611 for abuse of discretion. United States v. Brown, 72 M.J. 359, 362 (C.A.A.F. 2013) (citations omitted).[5]

"The abuse of discretion standard is a strict one, calling for more than a mere difference of opinion. The challenged action must be 'arbitrary, fanciful, clearly unreasonable,' or 'clearly erroneous.'" United States v. McElhaney, 54 M.J. 120, 130 (C.A.A.F. 2000) (citations omitted).

[5] In his brief, Appellant adopts the standard of review from his first issue as the standard of review for this issue. However, his first issue dealt with a mandatory instruction, an issue separate and apart from his current issue involving the questioning of a witness under Mil. R. Evid. 611. Appellant provides no reasoning, case law, or precedent to explain why he believes this issue warrants the same de novo standard of review as his instruction issue – especially in light of the precedent above showing Mil. R. Evid. 611 issues are reviewed for an abuse of discretion.

Mil. R. Evid. 611, *Mode and order of examining witnesses and presenting evidence*, states:

> (a) *Control by the Military Judge; Purposes*.
>
> The military judge should exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to:
>
> (1) make those procedures effective for determining the truth;
>
> (2) avoid wasting time; and
>
> (3) protect witnesses from harassment or undue embarrassment.
>
> . . .
>
> (c) *Leading Questions*. Leading questions should not be used on direct examination except as necessary to develop the witness' testimony. Ordinarily, the military judge should allow leading questions:
>
> (1) on cross-examination; and
>
> (2) when a party calls a hostile

"The general rule is that counsel, with the exception of adverse witnesses, may not ask leading questions on direct examination of a witness. However, the rule and the exception are not absolute, and it is within the sound discretion of the trial judge to permit such questions." United States v. Mansfield, 33 M.J. 972, 989 (A.F.C.M.R. 1991) (citing Mil. R. Evid. 611(c); Ellis v. Chicago, 667 F.2d 606 (7th Cir. 1981); United States v. O'Brien, 618 F.2d 1234 (7th Cir. 1980)).

"Leading questions are permitted in some circumstances on direct examination; the military judge has broad discretion in application of the rule." United States v. Thomas, 38 M.J. 614, 622 (A.F.C.M.R. 1993) (citing Mil. R. Evid. 611).

"Leading questions may be defined as those which suggest to the witness the desired answer, or which assume to be proved a fact which is not proved, or which by stating a material fact, permit an answer by a simple yes or no." Mansfield, 33 M.J. at 989.

Additional Facts

Prior to trial, the military judge ruled on motions related to Mil. R. Evid. 404(b) and Mil. R. Evid. 412. (App. Exs. XXI-XXII.)

During YR's testimony, the trial counsel asked, "Did you tell him at that time that you had had another ex-boyfriend that he didn't previously know about?" (R. at 358.) YR responded, "Yes, I did." (Id.) Appellant's trial defense counsel objected for leading. The military judge responded, "I'm going to give some leeway on these questions to ensure that we are consistent with the court's rulings in this matter." (Id.) Appellant's counsel responded, "*Thank you*, sir." (Id.) (emphasis added.)

Later during YR's testimony, Appellant's counsel made a Mil. R. Evid. 404(b) notice objection. (R. at 368.) During an Article 39(a) session, the parties discussed the Government's response to the defense's Bill of Particulars and whether YR's testimony was included within that response. (R. at 368-71.) The defense argued YR's testimony about an October assault was not included and moved for a mistrial. (R. at 371.) The military judge and Appellant's counsel then had the following exchange:

> MJ: I understand, defense counsel, however one of the potential remedies for this situation as [sic] to allow trial counsel some leeway to be more leading in his questions to this witness so that we stay focused on simply the charged offenses in this case. I agree that it doesn't seem to me to be that this is an intentional effort on the part of the government to elicit 404(b). Mostly these issues are arising out of the testimony of the witness which, as you know, as a long-time counselor is never completely within control of either party. I

do think that the objection as to the prior pushing and shoving is well taken. I will sustain that objection.

Under RCM 915, the military judge may as a matter of discretion declare a mistrial when such action is manifestly necessary in the interest of justice because of circumstances arising during the proceedings which cast substantial doubt on the fairness of the proceeding. At this stage of the trial I do not believe we have reached that stage. The members are new to this case but they do understand that the court instructs them as to how they are to consider evidence and when they are to disregard evidence. I also will instruct them at the end of the case how to do both of those things. I do not believe the matters to which defense counsel has objected and which I have sustained an objection are so monumental to the decision on deliberation to this case as to make a fair trial impossible. My expectation is the members will follow my instructions and deliberate simply on the evidence which is properly before them and the instructions I give. At this point, I do not believe a mistrial is warranted.

I do intend as a remedy in a sense to give trial counsel some leeway to ask a more leading questions of this witness to draw her testimony more specifically to the actual charges and specifications in this case . . .

. . .

DC: Yes, sir. I would like to be heard on the court's remedy. Sir, the defense's position is this is an insufficient remedy. Essentially it allows trial counsel to make his job easier. MRE 611 certainly does give the court discretion, but it also says that the only two times on direct examination -- well, three times on direct examination when leading questions should be allowed are laying the foundation, issues of credibility, or a hostile witness. The court's remedy goes outside the bounds to some extent of what is required or allowed under 611, understanding the court has discretion. Essentially, Your Honor, this ruling makes the trial counsel's job easier which in effect makes it more likely my client will be convicted. I request that the trial counsel not be allowed to lead; that he continue to ask the questions and do not elicit 404(b). With all respect to trial counsel who is a fine gentleman and a very good lawyer, he needs to be prepared for this and they are not. It's now to the detriment of my client, sir. So I would object to any attempt from the military judge to make trial counsel's job easier.

> MJ: All right, so I will state for the record that I am going to exercise my discretion to give trial counsel some leeway to ask leading questions to direct the witness to the specific incidents that are charged in this case; not as to the specifics of the incident that the witness will then discuss. I frankly think that makes trial counsel's job harder because trial counsel then does not have the opportunity to elicit sort of that interim evidence to set the scene or to establish some context which I think would probably make their case stronger as opposed to make their case weaker.
>
> DC: Understood, Your Honor. Thank you.

(R. at 371-74.)

The military judge then turned to YR and told her the following:

> [YR], I know you have been sitting here listening to this discussion. It's important that we keep this trial focused on the charges that are before us and consistent with the rulings that I have made in this case. So what's going to happen now is the trial counsel is going to direct you to specific instances of the charge. I ask that when you hear a question by trial counsel you focus on answering the question from trial counsel regarding the incident or the situation that he's drawing your attention to, and that if you are confused about that, you can certainly ask him to repeat the question or allow him to ask additional questions.

(R. at 374.)

Later, the military judge again told the trial counsel the confines of this ruling, stating, "You can direct the witnesses to specific instances in a leading way, however the answers the witness gives as to details of those instances of the charged offense will have to be her own testimony." (R. at 397.) Later, the military judge again highlighted the confines, stating to the trial counsel, "I will give some leeway on direction to specific instances, but when we get to those instances the conversation needs to be her words." (R. at 609.)

At a later point, the trial counsel asked a question to which Appellant's defense counsel objected, stating, "While the court has given some leeway, this is straight leading at this point, sir." (R. at 616.) The military judge sustained the objection.

Analysis

The military judge did not abuse his discretion by giving the trial counsel leeway in his questioning of YR. As shown by his initial discussion on the topic, the military judge's focus in allowing this leeway was to ensure YR was only testifying to matters "consistent with the court's rulings," which Appellant's counsel thanked him for doing. (R. at 358.)

As shown by the charge sheet and the Government's responses to the defense's multiple Bills of Particulars, this case centered on specific instances of misconduct and, as shown by the repeated objections, the defense was vigilant regarding unnoticed Mil. R. Evid. 404(b) evidence. In recognizing the need for YR's testimony to be focused on those specific instances – versus broad background and context testimony, the military judge, employing his "broad discretion,"[6] allowed the trial counsel leeway to meet that need.

Importantly, however, the military judge did not grant the trial counsel free reign in his questioning of YR. Instead, the military judge only allowed the trial counsel leeway in asking leading questions to direct YR to the specific incidents at issue in the case. On three separate occasions, the military judge made it clear that the trial counsel *could not* lead as to the specific details of the incident itself. (R. at 374, 397, 609.) Appellant's brief fails to note or discuss this vital distinction of the military judge's remedy. (*See* App. Br. at 22-26.) Appellant's brief also

[6] *See* Thomas, 38 M.J. at 622.

fails to note the military judge's direction to YR to answer only what was asked of her about the specific instances of the charge. (R. at 374.)

The military judge's decision in this instance is reasonable considering the circumstances and was done to cure the complaints raised by Appellant's counsel at trial. Appellant, however, fashions the military judge's remedy as a "reward" to the Government, while also claiming the remedy "disadvantages the defense by making the government's job easier and depriving the panel of important information." (App. Br. at 25.)

Yet, Appellant, in his brief, fails to mention that the military judge addressed this concern head-on during his ruling and found the exact opposite to be true. Contrary to Appellant's claim, the military judge believed his remedy made the trial counsel's job harder because the Government would be unable to "elicit sort of that interim evidence to set the scene or to establish some context." (R. at 374.) In failing to cite to this portion of the military judge's ruling, Appellant also fails to explain any fault or abuse of discretion in the military judge's analysis of this point.

Finally, Appellant claims prejudice because he believes this "format essentially allowed trial counsel to state the substance of the testimony, and merely have a friendly witness agree with him," while citing three excerpts from YR's testimony. (App. Br. at 23-25.) Yet, Appellant fails to note that his defense counsel objected to none of these questions – presumably because Appellant's counsel recognized the questions were within the bounds of the military judge's ruling. The one point when Appellant's trial defense counsel did object, the military judge sustained the objection. (R. at 616.)

To this point, YR's testimony spans 280 pages of transcript – from page 342 until page 622. While Appellant cites short excerpts from three pages of that 280-page span, a review of

YR's entire testimony shows that the trial counsel was not "allowed . . . to state the substance" of YR's testimony and YR did not "merely . . . agree" with those assertions as Appellant claims. Instead, the transcript shows that while the trial counsel did receive leeway to direct YR to certain dates and instances, YR herself testified about what happened during those instances. As detailed previously, YR testified as to what happened on 11 November 2021 in her own words. (*See* R. at 414.) There, YR said, "He was upset about the past. He wanted me to be very detailed in talking about the events in the past, and I could not remember. That made him more upset and it escalated to hitting." (Id.) In her own words, she said Appellant hit her "on my left side; like punching, closed fist," that he hit her "[m]ostly on my body," and that he caused "bruising." (Id.)

YR also explained, in her own words, multiples instances in December 2021 when Appellant would become physical. YR said Appellant slapped her in the face with his hand. (R. at 445.) Appellant's own counsel then had her affirm this testimony during his cross-examination of her. (R. at 581.)

As to the driving incident on 28 December 2021, the facts of that incident – at least as far as what Appellant did to YR – was not in dispute as Appellant's own counsel admitted during his opening statement that YR would testify that Appellant hit her "numerous times on the side of her body with his fist and with his open hand," and that the evidence would show "that is true." (R. at 336.) Thus, while YR detailed in her own words what happened during the driving incident on 28 December 2021 in response to questions during her testimony, there was no prejudice in any pseudo-leading questions related to Appellant's violent acts in the car since the defense had already stipulated that they occurred. Furthermore, YR's testimony was backed by

photographic evidence directly showing what Appellant had done to her. (R. at 490-92; Pros. Ex. 2.)

Here, the military judge granted trial counsel limited leeway to use leading questions for a narrowly defined purpose, a ruling that fell squarely within the military judge's broad discretion to control the mode and order of examining witnesses under Mil. R. Evid. 611. Appellant has failed to show the military judge's remedy here was either arbitrary, fanciful or clearly unreasonable or erroneous. *See* McElhaney, 54 M.J. a 130. Far from an abuse of discretion, the military judge's limited grant of leeway here was a judicious exercise of discretion in ensuring an admissible and narrowly focused presentation of evidence while protecting Appellant from inadmissible testimony. There was no abuse of discretion and no prejudice here. As such, this Court should deny Appellant's claim.

CONCLUSION

WHEREFORE, this Court should deny Appellant's claims and affirm the findings and sentence.

[redacted]

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court, appellate counsel, and the Air Force Appellate Defense Division on 5 December 2025 via electronic filing.

[redacted]

G. MATT OSBORN, Colonel, USAF
Appellate Government Counsel
[redacted]

IN THE UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES,
Appellee,

v.

Staff Sergeant (E-5)
JOHN ANDRE N. MABIDA,
United States Air Force,
Appellant

REPLY BRIEF ON BEHALF OF APPELLANT

Before Panel No. 1

No. ACM 40682

11 December 2025

TO THE HONORABLE, THE JUDGES OF THE
UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

Argument

I. WHETHER THE MILITARY JUDGE ERRED BY DENYING APPELLANT'S REQUEST FOR A SELF-DEFENSE INSTRUCTION.

1. The standard of review heavily favors Appellant

In all its invective against the defense argument, the government never grapples with the extremely defense-favorable standards applicable to this issue. "Any doubt whether an [affirmative defense] instruction should be given should be resolved in favor of the accused." *United States v. Davis*, 53 M.J. 202, 205 (C.A.A.F. 2000) (citing *United States v. Steinruck*, 11 M.J. 322, 324 (C.M.A. 1981). Even more significantly, when deciding whether an affirmative defense has been raised, "the court is obliged to view the evidence in the light most favorable to the accused."

United States v. Ruiz, 59 F.3d 1151, 1154 (11th Cir. 1995) (citation omitted). Courts have compared the standard to raise an affirmative defense as similar to the low standard for legal sufficiency (*United States v. Schumacher*, 70 M.J. 387, 389-90 (C.A.A.F. 2011)) and described the quantum of evidence necessary as "extremely low." (*Ruiz*, 59 F.3d at 1154).

Under a different standard, a different result might be possible.[1] But given this almost uniquely defense-favorable standard, the military judge clearly should have given the instruction requested by the defense, particularly where, as here, the defense strategy with respect to certain allegations hinged *entirely* on self-defense.

2. Self-Defense applied to some, but not all, of the diverse occasions charged in Specification 1 of Charge III

The government accurately notes that it's broad charging scheme encompassed multiple accusations of assault. *See* (Gov. Br. at 11).[2] The government breaks down the divers occasions into three categories, characterized as "two specifics instances . . . and a general timeframe . . . ." (Gov. Br. at 11). That is largely correct, although the two "specific instances" the government references each contained accusations of multiple assaults across a span of time. As the

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[1] Perhaps like the standard for a government-requested prior inconsistent statement instruction as in case the government cites: *United States v. Faile*, ACM S32098, 2013 CCA LEXIS 961, *16 (A.F. Ct. Crim. App. 2013).

[2] This theme is also intermixed throughout the Government answer on this issue.

government further notes, the defense theory differed as to different accusations. (Gov. Br. at 11-13). The self-defense issue applied to some, but not all, of the accusations.

This is all largely accurate, but it does not change the fact that the military judge was obligated to instruct on affirmative defenses that applied to some of the charged divers occasions (as discussed below, the self-defense issue likely applied to *all* the occasions on which the panel convicted, though that cannot be known for certain). The government seems to suggest, although it does not outright say as much, that the military judge would only be obligated to instruct on an affirmative defense if it applied to every one of the divers occasions. (Gov. Br. at 11). There is no authority for such a proposition and it would lead to an illogical result where the accused could be deprived of a defense simply by tacking on an additional accusation, however weak, where the defense did not apply.

3. <u>The defense theory is a factor as to whether to give an instruction</u>

As acknowledged by the government, the defense theory as to some of the charged assaults relied entirely on self-defense. Appellant argued in his opening brief that this factor favored giving the instruction. (Appellant's Br. at 11) ("The CAAF has also observed that 'the defense's theory of the case' is relevant for context as to whether to give an instruction.") (quoting *United States v. DiPaola*, 67 M.J. 98, 102 (C.A.A.F. 2008)). After all, given that this was appellant's *only defense* to some

of the charged conduct, the deprivation of the instruction essentially left no realistic path to an acquittal.

The government, however, accuses appellate defense counsel of omitting that this is a "non-dispositive factor." (Gov. Br. at 17) (quotation omitted). It is true, albeit unremarkable, that the defense theory is not the *only* factor as to whether an affirmative defense should be instructed on. That is simply how factor-based tests work. If the defense theory were a dispositive factor, there would be nothing left for this Court to decide (or the trial court for that matter).

The government further claims, without analysis, that this factor "weighs against [Appellant]." This argument is hard to understand because this factor obviously cuts heavily in Appellant's favor. Given that trial defense counsel conceded that some of the charged incidents occurred, and relied entirely on a self-defense theory for those incidents, the necessity for the instruction was at an absolute zenith. This dynamic can be seen in the government's own answer on the second issue, where the government leverages defense counsel's concession to argue that this specification was supported by strong evidence. (Gov. Br. at 22) ("the specification of which Appellant was convicted is backed by overwhelming evidence – including admissions by Appellant's counsel both at trial and before this Court that Appellant struck YR."). That is exactly why the defense needed the

instruction, and exactly why the CAAF has recognized that the defense theory is a relevant consideration.

4. Negative inference from disbelieved testimony

It is not completely clear whether the government disputes that the factfinder can draw a negative inference from disbelieved testimony. Controlling caselaw clearly allows for a negative inference.[3] The government acknowledges this precedent but either asks this Court to ignore it or, at the very least, seeks to distinguish the facts of this case.

The government's first objection is that "Wright, Nicola, and Mejia, dealt with criminal defendants who testified on their own behalf." (Gov. Br. at 15). But, the government argues, "YR was not a criminal defendant." (Gov. Br. at 16). The government's suggestion that a panel may draw a negative inference from a defendant's testimony but not from that of a non-defendant witness offends due process. There is no support in caselaw, and no room in our system of justice, for

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[3] *Wright v. West*, 505 U.S. 277, 296 (1992); *United States v. Nicola*, 78 M.J. 223, 227–28 (C.A.A.F. 2019) ("[T]he trier of fact may disbelieve the accused's testimony and then use the accused's statements as substantive evidence of guilt . . . ." (citation omitted)); *United States v. Mejia*, 82 F.3d 1032, 1038 (11th Cir. 1996) ("A proper inference the jury can make from disbelieved testimony is that the opposite of the testimony is true."), abrogated on other grounds by *Bloate v. United States*, 559 U.S. 196, 203 n.5 (2010); *see also United States v. Leonhardt*, 76 M.J. 821, 828–29 (A.F. Ct. Crim. App. 2017) (noting that the defense is entitled to cross-examine a witness on relevant issues even if the witness will deny the underlying facts because, *inter alia*, the members might not believe the denial).

the testimony of defendant to be examined within a different evidentiary framework than the testimony of other witnesses. This Court should roundly reject this suggestion.

The government further suggests that a factfinder can only draw a negative inference from narrative testimony, not from "simple 'yes' or 'no' answers" or, as here, a denial that past conduct occurred. (Gov. Br. at 15-16). Appellant is aware of no rule of evidence that would draw such a distinction. Under this framework, if YR had said "I did not punch my husband while he was driving or grab at the steering wheel" – the panel could presumably draw a negative inference, but if she simply replied in the negative to counsel's question about the same subject, they could not draw a negative inference. This makes little sense and is contradicted by this Court's published opinion in *Leonhardt*:

> The Government notes that [the witness] would presumably have denied the proffered post-offense consensual sexual encounters if she had been cross-examined about them. However, it is possible the members might not have believed her, *or* might have harbored greater doubts about her testimony and credibility more generally.

76 M.J. at 828-829 (emphasis added).

The government recognizes this tension between their argument and *Leonhardt* and suggests a distinction in that *Leonhardt* did "not involve an accused testifying." (Gov. Br. at 16). Again, this Court should not adopt a different rule for accused servicemembers as opposed to all other witnesses. The government further

states that "*Leonhardt* never stated that a witness's denials . . . could be used as substantive evidence that the opposite of the testimony was true." (Gov. Br. at 17). Instead, the government seems to interpret *Leonhardt* as only referencing the factfinder's ability to harbor more generalized doubts about witness credibility based on disbelieved testimony. (Gov. Br. at 17). As quoted above, this Court clearly stated that disbelieved testimony could be used for at least two purposes: (1) the members disbelieving the denial "or" (2) harboring greater doubts about "credibility more generally." 76 M.J. at 828-829. While the government suggests that only the latter of the two is appropriate, there is no basis in the text of *Leonhardt* to limit it in that way, particularly where it is specifically worded in the disjunctive. Additionally, while *Leonhardt* is controlling precedent, the Supreme Court and CAAF cases cited are even higher levels of controlling precedent, and in each instance they clearly allow for a negative inference to be considered substantively.

In contrast to controlling precedent, the government cites to this Court's unpublished opinion in *Faile* for the proposition that unadopted questions by counsel are not evidence. (Gov. Br. at 14) (citing 2013 CCA LEXIS at *16). To the extent there is tension between an unpublished case and controlling precedent from this Court, CAAF, and the Supreme Court, the latter must control. As this Court stated within the *Faile* opinion itself: "We may not ignore precedent of our superior court . . . ." *Id.* at *12. That said, Appellant is not sure there is tension here. *Faile* involved

a government-requested instruction on prior inconsistent statements (a much different standard than an instruction on an affirmative defense) and contained only three sentences of factual discussion on what seemed to be a factually intensive record. *Id.* at *16 (noting that a "close reading" of the testimony was required to parse whether the prior inconsistent statement(s) had been sufficiently established). These three sentences in an unpublished opinion certainly do not override controlling precedent. Unlike the standard in Faile, the "extremely low" standard applicable here is simply that the members "might" find a defense applicable "if they choose." *Schumacher*, 70 M.J. at 389 (citations omitted). This is very similar in substance (and even in wording) to the standard for a negative inference, which provides the factfinder "may" or "can" make such an inference. *United States v. Nicola*, 78 M.J. 223, 227–28 (C.A.A.F. 2019) (citation omitted); *United States v. Mejia*, 82 F.3d 1032, 1038 (11th Cir. 1996)

5. <u>This case is particularly well-suited for a negative inference</u>

Turning to this specific case, it is particularly ripe for a negative inference because the complaining witness' testimony was so incredible and, correspondingly, so likely a candidate for disbelief. This Court can judge for itself, and this dynamic can certainty be seen in the verdict. The panel was, for good reason, very ready to disbelieve YR's unbelievable testimony. The only place where they convicted was

the one area where (1) the defense conceded the underlying conduct, and (2) the military judge's instructions left no room to acquit, even under the defense theory.

6. The government's backup arguments

While not fully developed, the government takes the notably maximalist position that, even if the panel were able to substantively consider that YR had struck Appellant while driving and attempted to grab the steering wheel of a fast-moving car, the self-defense instruction would still not have been appropriate. (Gov. Br. at 19). While fighting off an individual who is attempting to crash a moving car seems like textbook self-defense scenario, the government argues:

> Yet, even if that were true, Appellant would still have to show that his reaction to YR's alleged acts were objectively reasonable considering the circumstances and that Appellant himself subjectively believed that that the force he used against YR was necessary for his protection.

(Gov. Br. at 19).

The former contention is an inaccurate recitation of the standard for self-defense. There is no requirement that the force used in self-defense be "objectively reasonable considering the circumstances." R.C.M. 916(e)(3). The government seems to be arguing for something like a proportionality requirement, but the Benchbook expressly disclaims such a requirement: "In protecting (himself) (herself), the accused is not required to use the same amount or kind of force as the attacker. However, the accused may not use force which is likely to produce death

or grievous bodily harm." (Military Judge's Benchbook, 5-19-2 (accessed 6 December 2025).

There is a requirement that the accused subjectively believe the force used was necessary for protection against bodily harm. R.C.M. 916(e)(3). The panel could have concluded this was met based on the same evidence from which they could have concluded that YR struck appellant and tried to grab the steering wheel. While Appellant did not testify, it is black letter law that an accused's testimony is not required to establish the subjective prong of a defense, even in the case of much more subjectively intensive defenses such as mistake of fact. *See, e.g.*, *United States v. DiPaola*, 67 M.J. 98, 100 (C.A.A.F. 2008) ("An accused is not required to testify in order to establish a mistake-of-fact defense.") (citation omitted); *see also United States v. Williams*, 553 U.S. 285, 306 (2008) ("courts and juries every day pass upon knowledge, belief and intent—the state of men's minds—having before them no more than evidence of their words and conduct, from which, in ordinary human experience, mental condition may be inferred.") (citations omitted). The panel could certainly have concluded that Appellant subjectively believed he had to fight off YR's attempts to grab the steering wheel while driving without direct evidence in the form of testimony from Appellant. Indeed, it seems basically inherent in the fact pattern of fighting off someone trying to grab the steering wheel of a moving car. If Appellant only hit YR after she hit him (and/or attempted to grab the wheel), one

could infer he did it to protect himself or stop the dangerous activities. Appellant's subjective belief that force was necessary is also apparent in the defense theory as to the other offenses, which the panel could have (and apparently did) accept: Appellant was not aggressive towards his wife in any other instances, but was only physical with her when she was placing their lives in danger.

The government routinely argues at trial, and before this Court, that an accused's subjective intent has been established beyond a reasonable doubt without direct evidence thereof. But now the government says Appellant's belief was not even raised to the "extremely low" standard necessary to raise an affirmative defense. This is an untenable position particularly where, as here, the subjective belief at issue is particularly susceptible to discernment from the surrounding circumstances. On top of everything else, the evidence must be viewed in the light most favorable to the accused. *Ruiz*, 59 F.3d at 1154. Perhaps the government articulates a path to which the panel could reach a different ultimate conclusion, but that is simply not the standard applicable to this issue.

7. Mutual combat

The government further suggests that the defense theory constituted "mutual combat," which could not qualify as self-defense. (Gov. Br. at 20-21). The defense theory was that YR dangerously hit appellate and tried to grab the wheel while he was driving. Appellant responded by striking her to get her to stop. This is not

appellate defense counsel's understanding of mutual combat. It is true that it involves strikes by both parties, but presumably most self-defense scenarios involve that. "Mutual combat" is more like a bar fight. *See, e.g.*, *United States v. Lewis*, 65 M.J. 85, 86 (C.A.A.F. 2007) (discussing the "mutual combat" rule in the context of "a fight outside a German club."). The government cites no caselaw for the idea that using force to stop someone from crashing your car constitutes mutual combat. In any event, this would be an issue of fact for the panel, not a prerequisite for giving the self-defense instruction in the first place. *United States v. Behenna*, 71 M.J. 228, 241-42 (C.A.A.F. 2012) (emphasizing that the question of loss of the right to self-defense is "rests with the court-martial panel.").

8. Prejudice

The government premises its prejudice argument largely on the idea that the panel convicted based on *all* YR's accusations encompassed within the divers occasions charging. *See* (Gov. Br. at 18-19) ("there was no evidence that self-defense applied in the incident in the Mexican restaurant parking lot") ("The same goes for the multiple instances through December 2021 when Appellant repeatedly slapped and abused YR."). But this Court cannot assume, as the government seems

assume, that the panel wholesale adopted the government's trial theory as to each of the divers occasions charged under Specification 1 of Charge III.

To the contrary, the most likely conclusion is that the panel convicted solely based on the car incidents which resulted in the bruising, and which the defense conceded had occurred. Regarding the other incidents, there was no corroboration or concession, and the verdict acquitting appellant of *all* YR's many other accusations give a strong indication that the panel was not prepared to convict on anything this woman said in the absence of corroboration or a concession. YR made *a lot* of accusations – and the panel seemingly rejected all of them. While the panel's verdict cannot be pierced, it is probable that they only convicted based on the strikes that the defense conceded.

This same dynamic increases prejudice. It seems from the verdict that the panel wholesale adopted the defense theory of the case. Given the option, they very well may have disbelieved YR's denials just as they obviously were unconvinced by the rest of her testimony – and voted against the government on the self-defense theory just as they voted against the government on every other theory at issue. Under this dynamic the government cannot disprove prejudice beyond a reasonable doubt.

To that point, the government does not really answer appellant's prejudice argument that, in the absence of the instruction, a conviction was all but inevitable,

because Appellant's sole defense to car accusations was premised on self-defense. And, for that matter, defense counsel clearly conceded the conduct occurred. This dynamic can be seen in the government's answer on the second issue, where they leverage defense counsel's concession to argue that this specification was supported by strong evidence. (Gov. Br. at 22) ("the specification of which Appellant was convicted is backed by overwhelming evidence – including admissions by Appellant's counsel both at trial and before this Court that Appellant struck YR."). In the absence of the requested instruction, the government's analysis is accurate. And that is exactly why prejudice is so high.

II. WHETHER RELIEF IS WARRANTED FOR PERVASIVE IMPROPER EVIDENCE AND ARGUMENT.

The government points to the military judge's curative measures as relevant to prejudice. (Gov. Br. at 22-25). This is true and it is certainly important that the military judge worked so hard to limit the impact of trial counsel's ignoble performance. As appellant stated in his opening brief: "Error is obvious. The question is really one of prejudice." (Appellant's Br. at 21).

Of course, the military judge's curative measures are an important factor in this Court's prejudice analysis. Nevertheless, curative measures are not dispositive. *See, e.g.*, *United States v. Armstrong*, 53 M.J. 76, 82 (C.A.A.F. 2000) (citations omitted). It may be an unusual case where there would be prejudice despite curative

measures, but the present case is nothing if not unusual. Appellate defense counsel have never seen such a volume of prosecutorial misconduct.

Additionally, while the Government suggests that the military judge cured every objection Appellant now raises, that is not strictly accurate. For example, the military judge overruled objections to several arguments that Appellant maintains were improper. *See* (R. at 862-69). But it is true that the military judge sustained a lot of objections and took a lot of curative measures.

III. WHETHER THE MILITARY JUDGE ERRED BY ALLOWING THE GOVERNMENT TO USE LEADING QUESTIONS IN ITS DIRECT EXAMINATION OF THE NAMED VICTIM AS A "REMEDY" FOR THE GOVERNMENT'S REPEATED ELICITING OF IMPROPER EVIDENCE.

In Appellant's opening brief, he requested that the government direct this Court's attention to any precedent for a trial judge allowing the prosecution to lead its witness as a remedy for prosecutorial misconduct. (Appellant's Br. at 25) ("If the government is aware of any precedent for such a ruling, Appellant requests it bring it to the attention of the Court."). The government does not point to any such authority, and Appellant is confident that none exists. As such, this Court is faced with something of an unprecedented scenario. While the government accurately points out that the military judge has a degree of discretion to control the mode and order of examining witnesses under Mil. R. Evid. 611, this Court should not hold

that this discretion extends to rewarding the government for its own misconduct.

The government makes the difficult-to-understand argument that defense counsel did not object to the leading questions that Appellant now complains of, "presumably because Appellant's counsel recognized the questions were within the bounds of the military judge's ruling." (Gov. Br. at 31). That is right, but defense counsel vigorously objected to the military judge's ruling itself. (R. at 373). After that objection was overruled, it would have been fruitless to continue to object when the ruling was put into effect. Defense counsel need only object once. *See* Mil. R. Evid. 103(b) (no need to renew evidentiary objection after definitive ruling).

Similarly intimating that defense counsel failed to sufficiently preserve this issue, the government suggests that defense counsel "thanked" the military judge for allowing trial counsel to lead the complaining witness. *See* (Gov. Br. at 30) (citing R. at 358). This is not an accurate representation of the record. The "thank you" the government cites was simply an acknowledgement of an earlier ruling by the military judge, in front of the members. (R. at 358). This exchange preceded the military judge's more fulsome explanation that he would issue the "remedy" of allowing trial counsel to lead the named victim (R. at 371-73) and was initiated by a defense *objection* about trial counsel leading the witness. Clearly defense counsel was asking the military judge to stop the leading, not to allow it. And, of course, defense counsel vigorously objected when the military judge later issued the

"remedy" of allowing the government to lead its star witness. (R. at 373).

Conclusion

WHEREFORE, Appellant respectfully requests this Honorable Court set aside the findings of guilty and the sentence.

[redacted]

[redacted]

SCOTT R. HOCKENBERRY
Civilian Appellate Defense Counsel
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Certificate of Filing and Service

I certify that on 10 December 2025 the foregoing was electronically filed with the Court and was emailed to Appellate Government Division.

[redacted]
SCOTT R. HOCKENBERRY
Civilian Appellate Defense Counsel
[redacted]

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40682 (f rev)**
Appellee	)	
	)	
v.	)	
	)	**NOTICE OF PANEL**
John Andre N. MABIDA	)	**CHANGE**
Staff Sergeant (E-5)	)	
U.S. Air Force	)	
Appellant	)	

It is by the court on this 12th day of March, 2026,

ORDERED:

The record of trial in the above-styled matter is withdrawn from Panel 1 and referred to a Special Panel for appellate review.

The Special Panel in this matter shall be constituted as follows:

GRUEN, PATRICIA A., Colonel, Senior Appellate Military Judge
RAMÍREZ, ROBERTO, Lieutenant Colonel, Appellate Military Judge
MORGAN, CHRISTOPHER S., Colonel, Appellate Military Judge

This panel letter supersedes all previous panel assignments.

FOR THE COURT

[redacted]

TANICA S. BAGMON
Appellate Court Paralegal